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CASES

ARGUED AND DETERMINED

IN THE

CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES

FOR THE

SEVENTH JUDICIAL CIRCUIT.

BY

JOSIAH H. BISSELL

OF THE CHICAGO BAR,

OFFICIAL REPORTER.

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JUDGES,

SITTING IN THE SEVENTH CIRCUIT DURING THE PERIOD COVERED BY THIS VOLUME.

HON. JOHN M. HARLAN,

ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES.

Allotted to the Seventh Circuit. Appointed November 29, 1877.

HON. THOMAS DRUMMOND,

CIRCUIT JUDGE FOR THE SEVENTH CIRCUIT.

Appointed December 22, 1869. District Judge since February 19, 1850.

HON. SAMUEL H. TREAT,

DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF ILLINOIS.

Appointed March 3, 1855.

HON. WALTER Q. GRESHAM,

DISTRICT JUDGE FOR THE DISTRICT OF INDIANA.

Appointed December 21, 1869.

HON. HENRY W. BLODGETT.

DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF ILLINOIS.

Appointed January 11, 1870.

HON. CHARLES E. DYER,

DISTRICT JUDGE FOR THE EASTERN DISTRICT OF WISCONSIN.

Appointed February 10, 1875.

HON. ROMANZO BUNN,

DISTRICT JUDGE FOR THE WESTERN DISTRICT OF WISCONSIN.

Appointed October 13, 1877.

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CASES

ARGUED AND DETERMINED

IN THE

CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES.

SEVENTH JUDICIAL CIRCUIT.

MARK T. SEYMOUR *et al.* vs. CHARLES A. GREGORY *et al.*

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—OCTOBER, 1876.

SUPERSEDEAS BOND—PERFORMANCE OF CONDITION—REMITTITUR—CHANGING JUDGMENT—RELEASE OF SURETIES.—The condition of a *supersedeas* bond was that the defendant (plaintiff in error) should prosecute its writ of error to effect, and answer all damages and costs if it failed to make good its plea. The judgment in the Court below was for $119,061.46—$107,353.44 being on a general verdict of the jury, and $11,708 being on a special verdict. The Supreme Court reversed the judgment and remanded the cause, ordering the special verdict to be set aside. The Supreme Court also ordered that if the plaintiffs would file a *remittitur* of the amount of the special verdict, in the Circuit Court, and a certified copy thereof in the Supreme Court, the judgment of reversal would be set aside, and a judgment of affirmance entered in its stead. This was ac-

cordingly done. In a suit against the sureties on the *supersedeas* bond: *Held*, that the condition of the bond had been complied with, and that the sureties were released from all liability.

On July 19, 1873, judgment was recovered by the plaintiffs in this action against the Phillips and Colby Construction Company, in the Circuit Court of the Northern District of Illinois for $119,061.46 damages, and $130.92 costs. The case was tried by a jury, who found a general verdict of $107,353.44, and a special verdict for extra cost of certain work of $11,708, which the jury said should be added to the general verdict, and the court rendered judgment both on the general and special verdicts for the entire amount.

On July 28, 1873, the Phillips and Colby Construction Company sued out a writ of error to the Supreme Court of the United States, and executed a *supersedeas* bond, whereby the present defendants became sureties that the Phillips and Colby Construction Company "*shall prosecute its said writ of error to effect and answer all damages and costs, if it shall fail to make good its plea.*"

The Supreme Court on December 13, 1875,[1] reversed the plaintiffs' judgment with costs, and declared that the cause "is hereby remanded to the said Circuit Court with directions to set aside the special verdict of the jury for $11,708, and to enter a judgment on the general verdict for $107,353.44, with interest from the 19th day of July, 1873, until paid, at the same rate per annum that similar judgments bear in the courts of the state of Illinois."

On the same day the Supreme Court also declared: "And it is further ordered that if the defendants in error shall, within a reasonable time during the present term of this court, file in the Circuit Court a *remittitur* of so much of the judgment of that court in their favor as is based on the special verdict, and produce here a certified copy of

[1] Reported in 91 United States, 646.

the *remittitur*, then the judgment of reversal here rendered will be set aside and a judgment of affirmance entered in its stead, the defendants in error to pay costs in this court."

On January 5, 1876, the plaintiffs, without notice to, and knowledge or consent of, the defendants filed in the Circuit Court of the Northern District of Illinois, their *remittitur*, which stated that they did thereby "remit from the judgment heretofore entered in this cause the sum of $11,708 and interest from the date of the entry of said judgment * * * and they pray the court here to reduce the said judgment to the sum of $107,353.44 * * * and that said reduction may be made now as of and for the day of the date of the entry of such judgment."

The Circuit Court, upon filing of this *remittitur*, granted the plaintiffs' request, and "ordered that leave be and the same is hereby given to the said plaintiffs to remit the said sum of $11,708 * * * that the judgment herein be reduced to the sum of $107,353.44 * * * and that such reduction be made now as of the date of the entry of said judgment."

This order of the Circuit Court was then certified to the Supreme Court, which, on January 11, 1876, entered upon its record the following order in the writ of error: "This case came on to be heard on the transcript of the record for the Circuit Court of the United States for the Northern District of Illinois, and was argued by counsel, on consideration whereof it appearing to this court that the judgment of the said Circuit Court is for a larger sum than should have been entered, and the said defendants in error having filed here, in open court, a certified copy of a *remittitur* in the following words, namely: [quoting it,] and also a certified order of said Circuit Court entered thereon, as follows, namely: [quoting it;] whereupon it is considered, ordered and adjudged by this court that the judgment of the said Circuit Court in this case be, and the same is hereby affirmed, deducting from the said judgment of said Circuit Court the amount so remitted as aforesaid, with interest until paid, at the same

rate per annum that similar judgments bear in the courts of the state of Illinois, the defendants in error to pay costs in this court, and that the said defendants recover against the said plaintiffs, Mark T. Seymour et al., $20 for its costs herein expended, and have execution thereof."

The plaintiffs paid the clerk's costs in the Supreme Court on the writ of error, and the defendant company had execution for the attorneys' costs against the plaintiffs.

The plaintiffs, on February 25, 1876, brought this action to recover from the defendants, as sureties in the *supersedeas* bond, the amount of the reduced judgment, being the residue of the original judgment of July 19, 1873, after it had been diminished by the *remittitur* filed January 5, 1876.

The defendants pleaded in abatement to the jurisdiction of the court; but the plea was overruled, and is reported in 7 Bissell, 460.

Sleeper & Whiton, for plaintiffs.

Edwin H. Abbot and *L. S. Dixon* for defendants.

DRUMMOND, J., charged the jury as follows: The breach on the bond alleged in the declaration is that the company did not prosecute its writ of error to effect and had not answered to the obligees all or any part of the damages and costs, by reason of the failure to make good its plea. And the declaration then sets forth the affirmance of the judgment by the Supreme Court on the 11th of January, 1876, the remanding of the cause, the issue of an execution from the Circuit Court against the company, the return of *nulla bona*, and avers that the company has no property in Illinois subject to execution, and that no part of the judgment has been paid.

On the facts of the case, which are all either in writing or of record and about which there seems to be no controversy, the questions are whether the plaintiffs have established:

1st. That the company failed to prosecute its writ of error to effect; or

2d. That the company failed to make good its plea.

It is not seriously insisted, as I understand, by the plaintiffs' counsel, that the company did not prosecute its writ of error to effect, but it is claimed that it failed to make good its plea.

The writ of error was regularly sued out and prosecuted, the record filed in due time, errors assigned, and everything done in the prosecution of the writ by the company, which the law or the rules of the court required; and the result proved that the writ of error had been effectual, because the judgment, on which the writ of error was sued out, did not stand.

The answer to the other question depends on what was meant by its plea and was its plea made good?

The bond recites that the company had prosecuted a writ of error to reverse the judgment.

The writ declares that it is issued because, in the proceedings and record, and in the rendition of the judgment, a manifest error had happened; and declares further that the record is to be taken to the Supreme Court to be inspected, and that the court "may cause further to be done therein to correct that error what of right and according to law and custom of the United States should be done." The plea is that manifest error had occurred in the record and judgment.

The Supreme Court found that was true and reversed the judgment, but promised if the defendants in error would perform certain acts and furnish evidence of the same to the Supreme Court it would affirm the judgment, and when the *remittitur* was made and proved to the Supreme Court that court did affirm the judgment; but what judgment? Not the original judgment on which the writ of error issued, but one purged of error as found by the Supreme Court.

The question then is, Whether within the meaning of the condition in the bond as against the sureties, the company

had failed to make its plea good because under the power conferred on the Supreme Court it had directed the judgment of this court to be changed, and then affirmed it as changed? I think not. It seems to me that under the facts of the case the company did prosecute the writ of error to effect, and did make its plea good, and as at present advised I so instruct the jury.

Verdict and judgment for defendants.

A motion for new trial was denied by the Court, and plaintiffs carried the case by writ of error to the Supreme Court of the United States, in which subsequently the judgment of the court below was affirmed by consent.

PHŒNIX INSURANCE COMPANY OF BROOKLYN vs. ERIE & WESTERN TRANSPORTATION COMPANY.

DISTRICT COURT—EASTERN DISTRICT OF WISCONSIN—NOVEMBER, 1879.

IN ADMIRALTY.

1. MARITIME SERVICE OR CONTRACT—TEST OF.—The true test of what constitutes a maritime contract or service is whether it is to be substantially performed or rendered on navigable waters.

2. ADMIRALTY JURISDICTION—THROUGH BILLS OF LADING.—A contract was made for the shipment of grain from Chicago, by which it was agreed that the "Anchor Line" of propellers should carry the grain to Erie and there deliver it to the elevator company, as the agent of the consignee, for transhipment by rail to certain inland points in Pennsylvania. The bills of lading denoted a rate of freight charged for a continuous trans-

portation service from the point of shipment to the inland points named, and provided that only that carrier should be liable for loss in whose actual custody the grain might be at the time of loss: *Held*, that in the case of loss while the grain was in the course of water transit, the court of admiralty had jurisdiction of an action against the propeller company.

3. RIGHT OF CARRIER TO BENEFIT OF INSURANCE.—A common carrier may, by contract with the shipper of goods, secure to itself, in case of any damage or loss to the goods, for which the carrier is liable, the benefit of any insurance to be effected by the shippers.

4. In such case the payment of a loss by the insurer to the shippers does not give the former any right of action against the carrier.

5. EFFECT OF STIPULATION AS TO INSURANCE—NEGLIGENCE.—It was stipulated in bills of lading that the carrier should not be liable for loss by perils of navigation, and that in case of loss for which the carrier should be liable, he should have the benefit of insurance effected by the insurers. A loss occurred, the proximate cause of which was a peril of navigation, but the remote cause was the negligence of the carrier. The insurer having paid the loss to the shippers, it was *held* he was not subrogated to their rights against the carrier and could maintain no action against the latter.

This was a libel to recover for the loss of certain shipments of grain delivered on board the propeller Merchant, July 24, 1874, at Chicago, to be transported, so far as it was to be carried on the lakes, to Erie, Pennsylvania.

At the time stated, libellant was a corporation of the state of New York, authorized to transact a general lake and inland insurance business. Respondent was a corporation of the state of Pennsylvania, authorized to carry on the business of lake transportation, and was the proprietor of a line of propellers running between Erie and lake ports, designated as the "Anchor Line," one of which boats was the propeller Merchant.

On said 24th day of July, 1874, the Merchant received on board, at Chicago, 16,325.34 bushels of corn, consigned to A. M. Wright & Co.; 800 bushels of corn, consigned to Elmendorf & Co., and 689.02 bushels of oats and 370.30 bushels of corn, consigned to Gilbert Wolcott & Co. Bills of lading were issued for and on account of these several shipments, the parts of which acknowledging receipt of the grain, were as follows:

Received, Chicago, July 24, of A. M. Wright & Co., the following packages (contents unknown), in apparent good condition, 16,325.34 bushels corn; order A. M. Wright & Co., Liverpool, Eng. Notify American Steamship Co., Philadelphia, Pa. Pro. Merchant.

Received, Chicago, July 24, 1874, of Elmendorf & Co., the following packages (contents unknown), in apparent good condition, 400 bushels corn; order Elmendorf & Co. Notify Abm. Whitenack, Bound Brook, N. J.; 400 bushels corn, order same. Notify same. Notify Wilkinson, Geddes & Co., Newark, N. J.

Received, Chicago, July 24, 1874, of Gilbert Wolcott & Co., the following packages (contents unknown), in apparent good condition, 689.02 bushels white oats, 370.30 bushels No. 2 corn; order Gilbert Wolcott & Co. Notify Louis Buehler, Tamaqua, Pa. Pro. Merchant.

Material parts of the heading of these bills of lading were as follows:

Anchor Line; Lake and Rail *via* Erie and the Anchor Line Steamers from all Lake Michigan ports. The Erie & Western Transportation Company is the proprietor of the "Anchor Line," which issues this bill of lading, and is a corporation of the state of Pennsylvania, having a real capital. The "Anchor Line" is the authorized and exclusive agent of the Pennsylvania Railroad Co., for its lake business *via* the Philadelphia & Erie Railroad and connections. It offers to the public a line of first class propellers, between the city of Erie and lake ports. Responsible through bills of lading and the shortest lake and rail line to the East.

In the bill of lading, issued to Wright & Co., was the clause, "rates from Chicago to Philadelphia @ 16c. per bus.;" in that issued to Elmendorf & Co., "rates from Chicago to Bound Brook and Newark, 17c. per bus.;" and in that issued to Gilbert Wolcott & Co., was the clause, "rates from Chicago to Tamaqua, Pa., corn 17c., oats 11c. bush." Each of these bills contained these further clauses:

That the said Anchor Line and the steamboats, railroad companies and forwarding lines with which it connects, and which receive said property, shall not be liable * * * for loss or damage by fire, collision, or the dangers of navigation while on seas, bays, harbors, rivers, lakes or canals. And where grain is shipped in bulk, the said Anchor Line is hereby authorized to deliver the same to the elevator company at Erie, as the agent of the owner or consignee, for transhipment (but without further charge to such owner or consignee) into the cars of the connecting railroad companies or forwarding lines, and when so transhipped in bulk, the said Anchor Line and the said connecting railroad company or carrier

shall be, and is, in consideration of so receiving the same for carriage, hereby exempted and released from all liability for loss either in quantity or weight, and shall be entitled to all the other exemptions and conditions herein contained.

It is further stipulated and agreed, that in case of any loss, detriment or damage done to or sustained by any of the property hereby receipted for during such transportation, whereby any legal liability or responsibility shall or may be incurred, that company alone shall be held answerable therefor in whose actual custody the same may be at the time of the happening of such loss, detriment or damage, and the carrier so liable, shall have the full benefit of any insurance that may have been effected upon or on account of said goods.

On the day of shipment, the libellant through its agent in Chicago, made an insurance on the consignment to Wright & Co. of $8,000, on that to Elmendorf & Co. of $520, and on that to Gilbert Wolcott & Co., of $700.

The Merchant, laden with the grain covered by these bills of lading, left the port of Chicago July 24th, and proceeded on her voyage to Erie. Having reached a point about ten miles south of Milwaukee, she was on the next day, at about nine o'clock in the morning, stranded in a fog on the west shore of Lake Michigan. By reason of this event, there was a total loss to the shippers of these several shipments of grain. Notices of abandonment were given to the insurance company, and on claim made, libellant paid to the several shippers the amounts of insurance on their respective shipments as and for a total loss.

The libel alleged that these shipments of grain were placed on board the Merchant, to be carried to Erie and there delivered for the shippers for transhipment; that the loss did not occur by reason of fire, collision, or the dangers of navigation, but was occasioned by the unseaworthiness of the vessel, and unskillfulness, carelessness and negligence in her conduct and management while on her voyage; and that by payment of the insurance on said shipments, libellant became subrogated to all the rights, interests and rights of action of the assured against the carrier. It was also alleged that these shipments of grain were in fact wholly lost, except

about 5,188 bushels, which quantity was brought into the port of Milwaukee in a perishable condition, and unfit for transhipment, and was sold by respondent for $1,037.60.

The suit being *in personam*, and the respondent being a corporation of another state, service was obtained by process of attachment levied upon a vessel of the Anchor Line found within the jurisdiction of the court, as authorized by the rules in admiralty.

The answer put the libellant upon proof of various allegations in the libel, and denied that the loss was occasioned by unseaworthiness of the propeller, or the unskillfulness, mismanagement, carelessness or negligence of respondent, or of any of its officers, agents or servants.

It was alleged that the propeller was seaworthy, and that the loss occurred by a peril of navigation, without any fault of the vessel, or any fault, negligence or want of skill on the part of those in charge of her.

As an affirmative defense it was alleged that at the time of the loss, the grain covered by the bills of lading was in the actual custody of the respondent, which was the carrier thereof, and that if any liability arose on account of the loss (which was denied), respondent was the company and carrier alone answerable therefor, and therefore, that by the provisions of the bills of lading, respondent became entitled to the full benefit of the insurance on the grain; and so, that no action could be maintained by libellant against respondent, on account of the loss.

A further defense interposed was that the court had no jurisdiction of the subject-matter of this action; and the ground of this defense was that by the bills of lading the grain in question was to be transported by respondent by boat, railroad companies and forwarding lines to points and places in the states of Pennsylvania and New Jersey, viz.: Philadelphia, Tamaqua, Bound Brook and Newark; that it was understood and agreed by the parties that part of the transportation should be performed on land and by means of railroad cars, and

that, therefore, the alleged causes of action set out in the libel were not causes of admiralty jurisdiction.

Van Dyke & Van Dyke and *N. J. Emmons*, for libellant.

W. P. Lynde and *George B. Hibbard*, for respondent.

DYER, J.—Upon the issues made by the pleadings, three questions arise, which were very fully and ably argued at the bar.

1. Has the court jurisdiction of the subject-matter of this action?

2. If the court has jurisdiction, and the case is to be considered on its merits, was the loss occasioned solely by a peril of navigation, or by the unseaworthiness of the vessel or the negligence and unskillfulness of those in charge of her, either in connection with, or in the absence of such peril?

3. Is the respondent entitled to the benefit of the insurance in this case?

First. Upon the question of jurisdiction, the claim of the respondent is, that the bills of lading were through contracts to carry the grain from Chicago to the several points inland, in Pennsylvania and New Jersey, by means of steamboats and railroads; that they were contracts made on land, to be performed on land by means of land carriage, in consideration of a single, entire through freight, which would be earned only on performance of the contracts, and that the contracts were, therefore, not maritime. It is true that the bills of lading denote a rate of freight for a continuous transportation service from the point of shipment to inland points in the states named; and to that extent they may be characterized as through contracts.

It is true, also, that part of this service was to be by rail, but the service to be performed by the Anchor Line was to be exclusively on water. The contracts were, that this line would carry the grain to Erie, and there deliver it to the elevator company, as the agent of the consignee for transhipment.

This line, as the bills of lading indicate, was but the agent of the connecting railways, and it would seem that the contracts for carriage beyond Erie were made by respondent as such agent. Furthermore, the bills of lading expressly provide that of the several connecting carriers, only the one upon whose line a loss might happen, should be responsible therefor; consequently for a loss while the grain should be in course of land transit, the respondent would not be liable. The loss in this case happened while the property was in course of water transit between the points expressly designated in respondent's contracts, and was therefore a loss for which, by the express terms of the contracts, the connecting carriers could not be made answerable. Although a single through freight was charged, the distinct and independent service to be rendered by respondent, or its line, was the carriage of the grain by water on one of its boats, from Chicago to Erie, and its service actually ended at that point: and although, under the contracts, the shippers might compel the connecting carriers to receive the grain and transport it to the points of consignment, it does not follow that the obligation of the respondent was to carry the grain further than to Erie, and there deliver it for transhipment. The provision in the bills of lading as to responsibility for loss, makes the contracts of carriage several with each carrier as to liability. The Pennsylvania Railway Co. would not be liable for loss happening while the grain was in transit between Chicago and Erie, and respondent would not be liable for loss occurring while transportation service was being rendered between Erie and Philadelphia, Tamaqua, Bound Brook and Newark. The obligation of the railway company to receive the grain and transport it to inland points would arise from the fact that its authorized agent, the Anchor Line, had contracted in its behalf that it would so do, on delivery of the grain at Erie. The undertaking of respondent was not to carry the grain to inland points, because its liability as a carrier was restricted to its own route.

The point was made upon the argument that the contracts specify that the grain was to be transported until it had "reached the point named in this bill of lading." The provision, however, is not that the transportation service shall be wholly rendered by the Anchor Line, but the language is, "to be transported by the Anchor Line, and the steamboats, *railroad companies and forwarding lines* with which it connects, until" the property "shall have reached the point named in this bill of lading."

Various illustrations were put by the learned counsel for respondent as tests of admiralty jurisdiction. They are more ingenious, than sound. A contract to build a ship is not a maritime contract. A contract for her towage is. It is supposed that a contract is made to build a ship in Milwaukee and to tow her to Detroit, and there deliver her for a whole sum, and it is asked if a court of admiralty would have jurisdiction of a cause of action founded upon a breach of the contract to tow the ship to the place of delivery. Concede, for the purposes of the illustration, that it would not, and if not, the reason is obvious, namely, that the towage service in such a case would be the mere incident of the principal thing, which would be the building of the ship, and of this principal subject-matter of the contract a court of admiralty would have no cognizance. Again, it is supposed that a railroad company has contracted to carry property from New York to St. Louis, and that by the negligence of servants upon a steam ferry boat belonging to the company upon the Detroit river, the property should be damaged, it is asked, whether an action *in personam* in admiralty could be maintained against the carrier. Again the answer is that if not, it would be because the transhipment or transfer by ferry would be merely incidental to the carriage of the property by land from New York to St. Louis, and no substantial part of the service was to be performed otherwise than on land.

The true test of a maritime contract or a maritime service is whether it is to be substantially performed or rendered on

navigable waters; if it is, then it is of maritime character, and the court of admiralty has jurisdiction. If it is not, then jurisdiction is disclaimed. That a very substantial part of the service to be performed under these contracts was to be performed upon navigable waters is not to be disputed. The loss happened upon these waters, while such service was being rendered, and under the construction of the contracts before given, and by virtue of the principle last stated, I cannot doubt that a court of admiralty has jurisdiction of the subject-matter of this suit.

Second. To what was the stranding of the propeller attributable? Did it arise solely from a peril of navigation, or was there co-operating negligence?

(Upon a review of the facts which this question involved, it was held by the court that there was negligence on the part of the master and mariners who were navigating the vessel at the time, and that although a peril of navigation was the proximate cause of the loss, the remote cause was such negligence.)

The last, and more difficult and interesting question remains to be considered, namely: Is the respondent entitled to the benefit of the insurance in this case?

The various grounds upon which libellant urges its right to recover are—

1. That the loss in question was occasioned by the negligence of the carrier; that therefore the shippers had a right of action against the carrier, notwithstanding the stipulations in the bills of lading limiting its liability; that the insurance company having paid the amount of the losses to the shippers, became subrogated to their rights, and may therefore maintain its action against the carrier for the amount so paid, and the carrier cannot avail itself of the clause in the bills of lading giving to it the benefit of the insurance, the loss having resulted from its own negligence.

2. That it is not proven that the shippers affirmatively assented to the limitations of liability and special provisions

contained in the bills of lading, and hence that such limitations and provisions are not part of the contract of shipment.

3. That the clause in the bills of lading limiting liability, including the provision in question, are wholly void, because of a statute of the state of Illinois [1]—where the contracts were made—which makes it unlawful for a common carrier to limit its common law liability safely to deliver property, by any stipulation or limitation expressed in the receipt given for such property.

The principal propositions urged in reply by respondent are—

1. That it clearly appears from the proofs, that the bills of lading, with all the clauses and stipulations which they contain, constituted the contracts between the carrier and the shipper under which the grain was shipped.

2. That the statute of Illinois referred to does not apply to bills of lading issued on account of shipments as in this case, and that in any event it is not controlling upon this court, the question involved being one of general commercial law.

3. That the stipulation giving to the carrier the benefit of insurance is valid, even though the carrier can not relieve itself from the consequence of its own negligence; that whether the losses in question arose from negligence or not, after the insurance company made payment to the shippers, they, the shippers, had no right of action against the carrier; that therefore there was no right to which libellant could be subrogated, and as a consequence, that no action will lie against respondent; in other words, that the stipulation in question, displaced or destroyed the right, which might otherwise exist, of the insurance company on payment of the insurance, to proceed against the carrier for reimbursement.

Without going at large into the proofs upon the question,

[1] Illinois Revised Statutes, chapter 27.

it will suffice to say, that I think the bills of lading should be regarded as the contracts between the shippers and carrier under which the grain was shipped. It is true that the decisions in Illinois enunciate a very strict rule in relation to proof of affirmative assent to special conditions in such contracts—a rule much stricter than is laid down by the Supreme Court of this state and some other courts.

But the proofs here are very satisfactory as to the shippers' understanding and knowledge of the character and contents of these bills of lading, and as to their acceptance of them with such knowledge of their character. The case is much stronger in that regard upon the facts, than *Railroad Co. vs. Manufacturing Co.*, 16 Wallace, 318, in which it was held, that an unsigned general notice, printed on the back of a receipt, does not amount to a special contract limiting common law liability, though the receipt with such notice on it may have been taken without dissent. In this state it has been held that when such a contract is in the custody of the shipper, its due delivery and his assent to its terms, are to be presumed, and that the burden is upon him to obviate these presumptions by proof. But it is not, I think, necessary to go thus far in order to sustain these bills of lading as contracts assented to by the shippers. By affirmative evidence it is sufficiently shown that they were understood and accepted as contracts under which the shipments were made; and what transpired between the shippers and the agent of the carrier prior to the delivery of the grain on board, and the execution of the bills of lading, was evidently understood by the parties as only the usual preliminary negotiations and understanding in relation to the shipments, which were to be followed by consummated contracts in the form of bills of lading.

There has been much controversy in the courts as to the power of a common carrier to limit its common law liability by special contract. Since the cases of the *New Jersey Steam Navigation Co. vs. The Merchants' Bank*, 6 Howard,

344, and *York Company vs. Central Railroad*, 3 Wallace, 107, the question, dealt with independently of statutory regulation, has not been an open one in the Federal Courts; and the right of the carrier to restrict or diminish his general liability by special contract, has been re-affirmed in *Railroad Co. vs. Manufacturing Co.*, 16 Wallace, 318, and in *Bank of Kentucky vs. Adams Express Co.*, 93 United States, 174.

It is equally well settled that a common carrier cannot lawfully stipulate for exemption from responsibility for the misconduct or negligence of himself or his servants: *Railroad Company vs. Lockwood*, 17 Wallace, 357; *Bank of Kentucky vs. Adams Express Co.*, *supra*.

Upon finding the fact of negligence in navigating the vessel, it follows therefore, in the case at bar, that the owners of the cargo could have recovered against the carrier, notwithstanding the limitations of liability expressed in the bills of lading.

An insurer of goods lost while in course of transportation by a common carrier, is entitled after payment of the loss, to recover what he has paid by suit against the carrier. No right, in the absence of special contract to the contrary, is better established. The legal principles upon which this right rests, are most clearly stated in *Hall & Long vs. Railroad Companies*, 13 Wallace, 370, by Mr. Justice STRONG, who says:

"It is too well settled by the authorities to admit of question, that as between a common carrier of goods and an underwriter upon them, the liability to the owner for their loss or destruction, is primarily upon the carrier, while the liability of the insurer is only secondary. The contract of the carrier may not be first in order of time, but it is first and principal in ultimate liability. In respect to the ownership of the goods, and the risk incident thereto, the owner and the insurer are considered one person, having together the beneficial right to the indemnity due from the carrier for a breach

of his contract, or for non-performance of his legal duty. Standing thus, as the insurer does, practically, in the position of a surety, stipulating that the goods shall not be lost or injured in consequence of the peril insured against, whenever he has indemnified the owner for the loss, he is entitled to all the means of indemnity which the satisfied owner held against the party primarily liable. His right rests upon familiar principles of equity. It is the doctrine of subrogation, dependent not at all upon privity of contract, but worked out through the right of the creditor or owner."

In *Hart and others vs. Western Railroad Corporation*, 13 Metcalf, 105, Ch. J. SHAW, states the principle as follows: "Now, when the owner, who *prima facie* stands to the whole risk and suffers the whole loss, has engaged another person to be at that particular risk for him, in whole or in part, the owner and the insurer are, in respect to that ownership and the risk incident to it, in effect one person, having together the beneficial right to an indemnity provided by law for those who sustain a loss by that particular cause. If, therefore, the owner demands and receives payment of that very loss from the insurer, as he may, by virtue of his contract, there is a manifest equity in transferring the right to indemnity, which he holds for the common benefit, to the assurer. It is one and the same loss for which he has a claim of indemnity, and he can equitably receive but one satisfaction. So that, if the assured first applies to the railroad company, and receives the damages provided, it diminishes his loss *pro tanto*, by a deduction from and growing out of, a legal provision attached to, and intrinsic in, the subject insured. The liability of the railroad company is, in legal effect first and principal, and that of the insurer secondary; not in order of time but in order of ultimate liability. The assured may first apply to whichever of these parties he pleases: to the railroad company, by his right at law, or to the insurance company, in virtue of his contract. But if he first applies to the railroad company, who pay him, he thereby diminishes his loss, by the application of a sum aris-

ing out of the subject of the insurance, to wit: the building insured, and his claim is for the balance. And it follows, as a necessary consequence, that if he first applies to the insurer, and receives his whole loss, he holds the claim against the railroad company in trust for the insurers. Where such an equity exists, the party holding the legal right, is conscientiously bound to make an assignment in equity to the person entitled to the benefit; and if he fails to do so the *cestui que trust* may sue in the name of the trustee, and his equitable interest will be protected."

Now, were it not for the stipulation contained in the bills of lading, giving to the carrier the benefit of the insurance, there would be no question of libellant's right to recover. And the precise point of inquiry is, What is the effect of that stipulation?

The perils insured against were generally "of the seas," and after enumerating various specific perils, such as fires, enemies, jettisons, pirates and the like, the policy provides that the insurance company "takes upon itself all other perils, losses and misfortunes that * * * shall come to the hurt, detriment or damage of the said goods and merchandise or any part thereof."

The question under consideration was to great extent argued by the learned counsel for libellant, upon the theory that to give to the carrier the benefit of the provision relating to insurance, would be to give effect to the limitation of its common law liability for the grain and its safe delivery contained in the bills of lading, even as against the carrier's own negligence. I do not perceive a necessary connection between the clause in the bills of lading limiting liability for a safe delivery of the cargo, and the clause giving to the carrier the benefit of the insurance, nor that it follows that because the former cannot exonerate itself from liability for negligence, the latter clause may not be held valid. To give the carrier the benefit of the insurance it must be liable to the shipper for the loss. Liability must exist as a pre-requisite to a claim to the

insurance. The agreement is, that if the carrier shall be liable for the loss, then he shall have the benefit of the insurance. And if it be correct to say that the validity of the stipulation relative to insurance is not dependent upon the validity of the clause which attempts to limit liability for the property, or, in other words, that the effect of the stipulation relating to insurance is not to defeat the obligation of the carrier to indemnify the owner against loss occasioned by its negligence, then it would seem that the Illinois statute does not bear upon the right of the carrier to contract with the shipper for the benefit of the insurance.

That statute provides: "Whenever any property is received by a common carrier to be transported from one place to another, within or without this state, it shall not be lawful for such carrier to limit his common law liability safely to deliver such property at the place to which the same is to be transported, by any stipulation or limitation expressed in the receipt given for such property."[1]

As will be observed, the prohibition here is against any limitation of common law liability safely to deliver the property; but this does not involve the right to stipulate for the benefit of the insurance in case of loss and liability. These clauses in the bills of lading are to be read as the application to them of legal principles requires, and so reading them, the provisions would in terms be that the carrier "shall not be liable * * * for loss or damage by fire, collision or the dangers of navigation while on seas, bays, harbors, rivers, lakes or canals," unless such loss or damage shall be occasioned by the negligence of said Anchor Line, its agents or servants. And, "in case of any loss, detriment or damage done to or sustained by any of the property hereby receipted for during such transportation, whereby any legal liability or responsibility shall or may be incurred, * * * the carrier so liable shall have the full benefit of any insurance that may have been effected upon or on account of said goods."

[1] Illinois Revised Statutes, chapter 27.

Admitting, then, that the loss of the cargo resulted remotely from the negligence of the carrier, the question recurs, Can that part of the contract which gives to the carrier the benefit of the insurance be enforced as a valid agreement? In the absence of such agreement, on payment of the whole loss by the insurer, the insured would hold their claim against the carrier in trust for the insurer. And if the agreement be valid, I think it follows that on payment of the loss by the carrier, the insured would hold their claim against the insurer in trust for the carrier; and further with this agreement in force, on payment of the loss by the insurer, the insured would have no right to go against the carrier, because the loss would be satisfied with moneys to which the carrier, as between it and the insured, would be entitled. It is settled by controlling authority that a common carrier has an insurable interest in the goods he carries, and can contract for the benefit of insurance effected by the owner.[1]

In *Savage vs. Corn Exch. Ins. Co.*, 36 New York, 655, it was held that a common carrier being bound to make safe delivery of goods at the place of destination, such obligation, together with his claim for advances and freight, gives him an insurable interest to the extent of the fair value of the property insured. Coming, then, directly to the point in issue, a test of the validity of this stipulation would seem to be, Could the carrier recover for a loss happening confessedly through his negligence, upon a contract of insurance, insuring against perils of the sea? Upon this question, counsel for libellant lay down the proposition, that negligence of a carrier or ship owner, if it can be insured against at all, must be made the subject-matter of express contract which cannot admit of a reasonable doubt. Formerly, this was a vexed question in the courts, but it is now fully and firmly settled by both English and American decisions, that a loss whose

[1] *Van Natta vs. Security Ins. Co.*, 2 Sandford, 490; *Chase vs. Washington Marine Ins. Co.*, 12 Barbour, 595; *Mercantile Mut. Ins. Co. vs. Calebs*, 20 New York, 177; 2 Parsons on Insurance, 200.

proximate cause is one of the enumerated risks in the policy, is chargeable to the underwriter, although the remote cause may be traced to the negligence of the master and mariners.[1]

In the case of *General Mutual Insurance Company vs. Sherwood*, 14 Howard, 351, it was held, that damages decreed by a court of admiralty to be a lien on the vessel insured, by reason of a collision produced by the negligence of those who navigated the vessel, cannot be recovered under a policy insuring against the usual perils and including barratry. The facts were peculiar. The plaintiffs in the action were the owners of a brig. Through the negligence of the master and mariners of the brig, another vessel was injured. In proceedings on the part of the injured vessel, the brig and her owners were adjudged liable for the damages, and the decree pronounced the collision to have occurred in consequence of the negligence. On payment of the decree, the owners of the brig sued the insurance company on a time policy, and set up the facts expressly alleging the negligence as the reason why they had paid the damages, and it was held they could not recover. It was therefore not the case of the insurers going behind the cause of loss and defending, by showing that this cause was produced by negligence, which Mr. Justice CURTIS says could not be done, but it was the case of the insured himself going behind the collision and showing as the sole reason why he had paid the loss, the negligence of his own servants and agents.

In *Copeland vs. Ins. Co.*, 2 Metcalf, 432, Ch. J. SHAW, in a very exhaustive opinion, containing a lengthy review of the authorities, held that "a vessel which is insured on a voyage out and home, and which departs with officers and a crew competent for the voyage, does not become unseaworthy by reason of the master's becoming incompetent, at the for-

[1] *Patapsco Ins. Co. vs. Coulter*, 3 Peters, 222; *Columbia Ins. Co. vs. Lawrence*, 10 Peters, 507; *General Mut. Ins. Co. vs. Sherwood*, 14 Howard, 351; *Copeland et al. vs. The New England Marine Ins. Co.*, 2 Metcalf, 432, and cases cited in these decisions.

eign port, to command the vessel; and if the vessel sails from such port under his command, and is lost on the homeward passage, the underwriters are not discharged, although the loss may have been caused by the master's incapacity. And although, in such case of the master's incompetency, it is the duty of the mate to take command of the vessel, and although he has a right to resort to all lawful means to establish himself in the command; yet if, from want of judgment, or even from culpable negligence, he omits so to do, and the vessel sails under the master's command, and is stranded, the underwriters are not discharged." And in the opinion there is this enunciation of the law which is specially pertinent: "It is very clear in this case, that the immediate cause of the loss, was stranding in the night time, which is one of the perils insured against; and the case supposed is, that this was occasioned by the default of the mate in not assuming the command. The default must consist, either in a want of judgment in perceiving and determining that the master had become so deranged or incapacitated as to authorize and require him to interpose, or in negligence in the performance of his duty, when the case occurred. Such a case may occur in every voyage, and must be considered as one of the contingencies incident to navigation. It may often present questions of great difficulty, in acting on which, mistakes, on the part of the officer second in command, may occur. But we cannot perceive why the duty of the mate was not of a purely official and professional character, growing out of his powers and the relation in which he stood as an officer, and not devolving on him as the agent of the owners, in any other sense than that in which pilots and all other officers and mariners are their agents. They are vested with certain powers to be exercised for the use and benefit of owners, freighters, underwriters, and all others who are directly or remotely interested in the vessel and voyage. I cannot distinguish the negligence of the mate, in the case supposed, from his failure in the performance of any other duty as a nautical man.

Suppose a case of a loss by stranding, and it could be satisfactorily proved, that if, in a particular emergency, sail had been made or taken in, if an anchor had been carried out or the vessel put on another tack, the disaster might have been avoided, it would indicate a similar mistake of judgment or neglect of duty on the part of the commanding officer as that in the case supposed. In both cases, it is a mistake or neglect of his peculiar and appropriate duty as an officer and seaman. For the performance of these duties, we are of opinion that the owners, as between themselves and the underwriters, are not responsible. A contrary doctrine would lead to questions of great difficulty, involving numerous questions of fact of very difficult proof, as to the skill and seamanship of all the nautical measures taken in the whole conduct of the voyage. Besides, these mistakes of judgment and instances of negligence are incident to navigation, and constitute a part of the perils that attend it; and they can no more be restrained, prevented, or guarded against, by the owners, than by the underwriters. The most cautious foresight can only enable owners to provide a competent crew of officers and seamen at the commencement of the voyage. What reasons, then, are there of justice or policy, what considerations growing out of the nature of this contract, or the relations of the parties, which should prevent the owners from insuring themselves against this peril?"

Stranding is a peril of the sea. In the case at bar, the stranding of the vessel was the proximate cause of the loss. The remote cause was the negligence of the master and mariners in navigating the vessel. The law being as stated, it follows, that if the case were that of insurance in favor of the carrier against the perils of the sea, the insurer could not go behind the proximate cause of the loss and defeat a recovery by showing the negligence of the master and crew of the vessel. We have, then, this state of case: The carrier made itself liable for the loss of the cargo by a peril of the sea, if negligence co-operated in causing the loss. The owners

of the cargo contracted with the carrier that if loss should occur for which liability arose, the carrier should have the benefit of any insurance on the property. The shippers then contracted for insurance against the usual perils. There was a loss for which the carrier was primarily liable to the shippers. The proximate cause of the loss was a peril of the sea. It was a loss, therefore, which the carrier could directly insure against, and the fact that its remote cause was negligence would not relieve the insurer. Why could not the carrier secure, by the indirect way of a contract with the shippers, in case of its liability for a loss, the benefit of their insurance, if it could by direct contract with the insurer, have obtained indemnity against loss caused proximately by a peril insured against, but remotely by its own negligence? If it be said that the rights of the insurance company ought not to be affected by a contract between the shipper and the carrier, I think it may be answered that the company put itself in privity with such contract, by its contract of insurance while the property was in transit, and that it dealt with the insured property, subject to the terms of the bills of lading, which gave to the carrier the benefit of the insurance in case of loss for which the carrier should be liable. The case does not show that any fraud was intended by the carrier in making this stipulation with the shippers. The agent of the insurance company was also the agent of the carrier, and the same person issued the certificate of insurance and made the contracts of shipment with the shippers. And in the light of all the facts and the legal principles which I have endeavored to state, I cannot bring my mind to any other conclusion, than that this was a lawful and valid contract. If this be so, then upon receiving payment for their losses from the insurer, the right of the insured to proceed against the carrier was determined, and no such right remained to which the insurer could be subrogated, because necessarily the insurer must take the rights of the owners of the cargo subject to all agreements and equities between the insured and the carrier. *Mercantile Ins. Co. vs. Calebs et al.*, 20 New York, 173.

In the case last cited, the Court of Appeals of New York held that a common carrier may, by contract with the owners, secure to himself, in case of damage or loss to the goods for which the carrier would be liable, the benefit of any insurance to be effected by the owner, and that this abandonment to the insurer against marine perils, of goods damaged during their transportation, under such a contract, and payment of the loss does not give to the insurer any right of action against the carrier.

This case was much criticised upon the argument, but I do not see why, upon principle, it is not sound. It is true that the case did not present the element of negligence on the part of the carrier, and the court alludes to this fact in the opinion; but I think only for the purpose of calling attention to the point that not even primary liability of the carrier for the loss of the goods was in that case shown. But a careful reading of the opinion, I think, shows that even though such liability were established by direct proof of negligence, it was the view of the court that the contract was valid; for, after alluding to the absence of the element of negligence, the opinion proceeds: "But it is enough that the plaintiffs took the rights of the owner of the goods subject to all agreements and equities between the insured and defendants; and that the contract between them being valid, protects the latter against a recovery by the plaintiff."

In conclusion, I must hold that the provision in the bills of lading giving to the carrier the benefit of insurance on the property was valid, and that no right of subrogation accrued to libellant, since the insured, on payment to them of the insurance, had no right of action against the carrier.

NOTE.—On appeal to the Circuit Court this decision was affirmed by DRUMMOND, Circuit Judge. [*Reporter.*

HUGH GRAHAM vs. CYRUS H. McCORMICK *et al.*

Circuit Court—Northern District of Illinois—March, 1880.

In Equity.

1. Patent Law—Applications—Rejected Claims—Continuity of Proceedings—Two Years' Limitation of Public User.—Where an application for a patent was filed, covering several claims, some of which were rejected, and subsequently, but before any patent was issued on such application, a second application was filed, embracing the subject-matter of the rejected claims of the first application, and the invention in the second application being described in the specifications and drawings of the first, the said rejected claims being afterwards withdrawn from the first application, and a patent thereupon issuing upon the good claims of such application, and a patent subsequently issuing upon the second application: *Held*, that for the purpose of fixing the time when the two years began to run within which the invention could be sold and publicly used without invalidating the patent, the continuity of the proceedings which originated in the first application was not broken up to the time of the issuing of the latter patent, and the two years dated back from the time of filing the first application.

2. Public Use for Two Years—Evidence.—When the infringer of a patent sets up in defense that the patent was void by reason of public use for two years prior to the filing of the application therefor, the proof should be clear and satisfactory in order to justify the court in sustaining that defense.

3. Specifications—Application—Estoppel.—Where in the specifications accompanying a patent, a certain invention is described for which no claim is made and which is not covered by the patent issuing, this does not estop the inventor from afterwards applying for and obtaining a patent for such invention

4. Graham Patent, issued February 11, 1868, for an improvement in harvesters, sustained.

Banning & Banning, for complainant.

E. N. Dickerson, *M. D. Leggett* and *Offield & Towle*, for defendants.

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there until the 2d of December, 1865. The patentee claims that instructions were given to the solicitors to file the application at once, and he supposed that it was so filed. It contained five claims, the first of which embraced the invention now in controversy. On the 30th of December, 1865, the first three claims were rejected, an offer being made at the time to allow the other two claims. This offer was not accepted, and on the 24th of March, 1866, an amended claim was filed in place of the first rejected claim. It is understood that this referred to the invention now in controversy. On the 4th of April, 1866, this claim was rejected. On the 11th of February, 1867, the first application being still pending, with the action of the patent office as stated, a second application was filed, containing, among others, the two claims now in suit. In June, 1867, the claims which embraced the invention now in controversy, were withdrawn from the first application, and on the 23d of July, 1867, a patent was issued on the first application. As issued, that patent did not include the invention now in suit. A patent for the invention in controversy now, was issued on the second application on the 11th of February, 1868. A description of the invention now under consideration was contained in the original specifications and drawings which accompanied the first application.

It is claimed by the plaintiff that under this state of facts, the application for the patent embracing this invention for the purpose of fixing the time when the two years should begin to run, should be considered as having been made on the 25th of February, 1864, when the patentee's first application was put in charge of his solicitors; or, if that be not so, that it should be considered as made when that application was filed in the patent office on the 2d of December, 1865, so that the two years would embrace the years 1864 and 1865. On the other hand, it is contended by the defendants that the two years began to run on the 11th of February, 1865, because the second application, upon which

the present patent was issued, was filed on the 11th of February, 1867; and that the connection between the first and second application was effectually broken, under the circumstances, so that the two applications could not be considered one continuous proceeding.

The rule is well settled that if an invention has been in public use or on sale with the knowledge and consent of the inventor more than two years before his application for a patent, it will render the patent invalid; but it is clear that in order to determine whether the case is within the rule, we must consider whether the particular devices which the inventor claims to have invented were perfect, so that they embodied a complete invention. We have some doubts, even upon the theory that the two applications should be considered as parts of one and the same proceeding, whether the patentee's first application can be regarded as made, within the meaning of the law, at the time it was placed in the hands of his solicitors, in February, 1864; but we think, under the circumstances which attended the efforts of the patentee to obtain a patent, together with the connection which the second application seems to have with the first, that for the purpose of fixing the time when the two years began to run, the second application should be treated as a continuation of the first, and that both are part of one proceeding.

In this respect, this case is not wholly unlike that of *Smith vs. Goodyear Dental Vulcanite Company*, 93 United States, 500, where the court held that the effort to obtain a new patent in 1864, ought not to be regarded as disconnected from the original application made in 1855, and that it was but one stage in a continuous effort. It is true that in this case, unlike that, a patent was granted on the first application covering the claims which were not rejected, and the patent in this suit was granted on the second application; but the subject-matter of the second application was embraced in the first, and the invention now in controversy was described in the

specifications and the drawings which constituted part of the first application, and we think it may be said that the continuity of the proceedings which originated in the first application was not broken, up to the time when the patent for the invention in suit was granted in 1868. See, also, *Blandy vs. Griffiths*, 3 Fisher, 616.

In view, therefore, of the circumstances under which Graham made his second application and withdrew from the first the claims covering the invention now in suit, we cannot say that the proceedings should be severed so as to make the two years date back from the 11th of February, 1867; and we think that the two years, within which the invention could be sold and publicly used without invalidating the patent, began to run on the second of December, 1863, which was two years prior to the filing of the first application. It is manifest that the only machine made in 1863, which is distinctly proved to have been sold, was delivered on trial and warranted, and should be regarded rather in the light of a use of the invention for such practical tests as the law permits an inventor to make, than as such a public sale or use as is contemplated by the statute. At that stage of the inventor's work his invention was largely in experiment and trial. It could only be tested by practical use in the field, and it was essential that it should be so tested by farmers on their farms. The inventor was then struggling, as inventors often do, to establish the success of his invention. It was necessary that thorough experimental tests should be made, and that he should have the assistance of others in making them; and it is manifest, we think, that the machines of 1863 were not yet so perfected as to be practical machines, capable of successful work.

In the light of all the testimony we conclude that what was done by the patentee with reference to the use of the machines in 1863, was intended by him, and was in fact, for the purpose of experiment, and as a test of the machines with a view to their perfection. This part of the defense

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It is also insisted by the defendants that the plaintiff cannot maintain the suit, because the inventor had not the right to assign to him the whole interest in the invention under the patent of 1868.

On the 25th of November, 1865, A. B. Graham, the inventor, made a contract with W. B. & C. A. Worden that they should have the exclusive right to manufacture and sell the improvement in the machine, and that, that right should continue until the patent about to be applied for expired; and Graham agreed that before the letters patent should issue for the invention, he would make such necessary assignment that the patent might issue to all the parties jointly, each to have an undivided one-third interest therein. It will be observed that this was not of itself an assignment, but only an agreement to assign.

On the same day that this contract was made, what purported to be an assignment was executed by Graham. It stated that, whereas Graham himself and the Wordens had agreed to purchase from Graham all the right, title and interest which he had in the invention, through the grant

of the letters patent therefor, therefore he, Graham, assigned to himself and the Wordens the full and exclusive right to said invention of all the improvements made by him, as fully set forth and described in the specifications which he had prepared for the purpose of obtaining a patent. The circumstances connected with the application and obtaining the respective patents have been already stated. On the 23d of July, 1867, in pursuance of the contract and assignment already referred to, letters patent were issued to Graham and the Wordens. That patent is not the subject of controversy here. On the 11th of February, 1868, a patent was issued, which included the two claims in controversy here, to A. B. Graham alone.

It is claimed by the defendants that these facts show that A. B. Graham could not assign to the plaintiff a right to enable him to maintain this suit, in his own name, on the patent of 1868.

The evidence tends to show that a controversy arose between A. B. Graham and the Wordens as to the contracts of November 25, 1865. The former insisted that the Wordens had not complied with their contract, and from that or some other cause there seems to have been no additional assignment made to the Wordens of any interest in the patent of 1868; and, as already stated, that patent was issued to Graham alone. We think that upon this state of facts, there being no controversy about the validity of the assignment by A. B. Graham to the plaintiff of the patent of 1868, that the plaintiff must be considered as having the legal title to that patent, and consequently has the right to maintain this suit in his own name. Whatever equities there may be between the parties to the contract of November, 1865, can be adjusted in a controversy between themselves or their legal representatives. We do not think that the defendants can claim that the facts stated constitute a defense to this action.

The two claims of the Graham patent which are alone in

controversy here are the first and second. The first claim is for a combination of the finger-beam with the gearing carriage by means of the vibratable link, the draft-rod, and the two swivel joints, M and M', so that the finger-beam may both rise and fall at either end and rock backward and forward; and the second claim is the same as the first with this only added, that an arm is attached to the vibratable link by which the rocking of the finger-beam is controlled by the driver. The object of this invention as set forth in these two claims seems to be mainly to produce the rocking motion of the finger-beam, as described and by the method described.

In the Ball patent, while there may be said to be something equivalent to the swivel joint M of the plaintiff's machine, where it is attached to the frame, and also something similar to the draft-rod and the arm, there is nothing to produce the rocking motion, which is the essential object in the first two claims of the plaintiff's machine; and consequently there is no swivel joint M', as in the plaintiff's machine; so that there is nothing in the Ball machine to prevent the validity of the combination in the first two claims of the plaintiff's patent.

The Zug machine has, if not a swivel joint like that of the plaintiff's at M where connected with the frame, something which seems substantially similar. It has a vibratable link and it has something which is equivalent to the draft-rod, the main difference being that it is attached beneath the shoe instead of above, but there is no swivel joint M'. There is an arm which is attached to the draft-rod and shoe by which it can be raised and lowered, but Zug claims in his patent that when the machine is in progress over the field, and when the finger-bar strikes any obstacle, there is a device in a box in which the forward part of the draft-rod is fastened, by which the finger-bar yields to the obstacle; and that there is also a mode by which the vibratable rod is attached to the frame called "joint 16", in his patent, and what has been termed an open clevis where the vibratable

link is connected with the draft-rod, by which a motion is given to the finger-bar and thus the finger-bar is relieved from the obstacle. Zug does not claim that the finger-bar in his machine has a rocking motion, but only that the mode by which the draft-rod is fastened and the motion given to the finger-bar, prevents the obstacle which the machine may meet from doing damage to it.

These seem to be the main differences between the two machines, and the question is, whether there is anything in the Zug machine to prevent the combination named in the first two claims of the plaintiff's patent from being valid.

The defendants' machine has the swivel joint attached to the frame, the vibratable link in the same form as the plaintiff's, and the draft-rod attached forward in substantially the same way as the plaintiff's; but instead of having a swivel joint at M' as stated in plaintiff's machine, forward of the shoe, the draft-rod has a swivel joint at the rear end of the shoe; and there is an arm attached to a part of the vibratable link substantially like that of the plaintiff's; and the substantial difference, as it seems, between the plaintiff's device as described in the first and second claims, and that of defendants' is, that the draft-rod is attached to the rear part of the shoe, and not to the forward part as in the plaintiff's patent. There are also other devices in the defendants' machine which may make it different from the plaintiff's. But as to the swivel joint, the vibratable link, and the mode in which the motion is produced in the finger-bar, there does not seem to be much difference in substance; and in both machines, and by substantially the same means, there is produced a rocking motion.

In this connection it is noticeable that the defendants in the claims set forth in the specifications of their patents, make a rocking motion of the shoe and cutter, a feature of their combination. In their second claim they say that they claim the combination of the "shoe, and the drag-bar extending over and in rear of the shoe, and its swivel pin connecting

it with the rear end of the shoe, whereby the drag-bar sustains the thrust of the shoe while leaving it free to rock on its hinges." Again, in their fifth claim they say that they claim the combination "of the shoe, the forked coupling-arm, the drag-bar extending over and in rear of the shoe, the swivel-pin connecting the two, the rocking lever and detent mounted on the drag-bar, and the adjustable link connection between the lever and the coupling-arm, whereby the shoe readily may be rocked or adjusted." And again, the motion which seems to be produced in the operation of plaintiff's machine is more distinctly described in the seventh claim made by the defendants in their patent, as follows: The combination "of the shoe, the drag-bar, the forked coupling-arm," and the other elements of mechanism before mentioned, "whereby the shoe is first rocked, and then lifted by one continuous movement of the lever."

It must be confessed that the difference between the Zug machine and the first two claims of plaintiff's patent is not very marked. But in view of the description contained in the specifications of Zug's patent and in those of the plaintiff's patent, we are inclined to think that the plaintiff's patent may be sustained on the ground that there is a difference in the manner in which the draft-rod is attached to the shoe and the finger-bar to the shoe, and to the vibratable link; and that there is also a difference in the manner in which the combination of the various parts are adjusted, and that there is an effect produced in the plaintiff's machine which does not exist in the Zug machine. In the plaintiff's machine there is a rocking motion, and not a mere vibratory motion, such as exists in the Zug machine in consequence of the open clevis, neither is there in the plaintiff's machine the yielding of the draft-rod as described in the Zug patent; and it is obvious too, from the manner in which the parts are constructed in the Zug machine that there is only a small vibratory action of the finger-bar; so that, on the whole, we

think that the combination as described in the plaintiff's patent may be sustained.

Then, from what we have said, we do not see that there can be any substantial difference between the combination, as described, in the plaintiff's machine, of the swivel joints, draft-rod and vibratable link, with the frame and shoe and finger-bar, and that of the defendants' machine. The differences which have been stated between the two machines in this respect do not constitute any difference in principle. The one is substantially the same thing as the other. The additions which have been made to the defendants' machine, such as the device by which the pressure of the cutting apparatus upon the ground is regulated, and other devices which have been made, do not affect the combination as claimed in the plaintiff's machine. The attachment of the draft-rod to the rear part of the shoe instead of to the front part, which is substantially the only difference that there seems to be in the mode of construction, cannot constitute a difference in principle, and cannot prevent the defendants' machine from being an infringement of the plaintiff's patent.

It may be said that there are differences also between the defendants' machine and that of the plaintiff, in the manner in which the arm is attached to the vibratable link, and also as to the mode in which the force applied to the arm may operate upon the finger-bar; but these are differences of form and not of substance.

Judge DYER by request sat with the Circuit Judge on the hearing of this cause, and concurred in the foregoing opinion.

Judge DYER subsequently delivered an opinion [unreported] in a case heard before him involving the validity of this same patent, and took the same view which is taken in this opinion. [*Reporter.*

SAMUEL C. DAVIS vs. WILLIAM JAMES *et al.*

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—JULY, 1880.

IN CHANCERY.

1. FEDERAL JURISDICTION—EFFECT OF STATE STATUTE.—The fact that a state statute may provide that all actions of a particular character arising within its limits, shall be brought in a certain State Court, will not affect the jurisdiction of Federal Courts in such actions, if they would otherwise have jurisdiction.

2. SAME—MORTGAGE BY GUARDIAN—FORECLOSURE.—A state statute which provides that guardians may mortgage the estates of their wards in certain cases, but that foreclosure of such mortgages shall only be made by petition to certain State Courts, does not affect the right of the mortgagee to foreclose such mortgage in the Federal Court, when that court would otherwise have jurisdiction on account of the citizenship of the parties.

Paddock & Ide, for complainant.

Robert Hervey, for defendants.

DYER, J.—This is a bill to foreclose two trust deeds, and the case has been heard upon pleas to the jurisdiction of the court. It appears from the bill and pleas that on application to the County Court of Cook county by the defendant James, as guardian of the minor heirs of Robert D. McFarlane, deceased, he was duly authorized by that court to borrow the sum of $50,000, for the purpose of erecting buildings on the premises in question; and, to secure such loans, was further authorized to execute mortgages or trust deeds upon the premises; and pursuant to such order the guardian borrowed $40,000 from complainant in 1873, and $10,000 in 1874. And in his capacity as guardian the defendant James executed to complainant his promissory

notes for the sums so borrowed, together with trust deeds on the real estate, to secure the payment of such notes. The pleas allege that these trust deeds were executed solely under the authority of the state statute, and the order of the County Court acting in pursuance of such statute, and that the complainant, when he made the loans, had knowledge of such fact, and of the provision of the statute under which a guardian of minors may be empowered to execute trust deeds or mortgages.[1] The point raised by the pleas is that these trust deeds can only be foreclosed in the County Court which authorized their execution. The statute provides that the guardian may, by leave of the County Court, mortgage the real estate of his ward for a term of years, not exceeding the minority of the ward, or in fee, and that before any mortgage shall be made the guardian shall petition the County Court for an order authorizing such mortgage to be made, in which petition shall be set out the condition of the estate, and the facts and circumstances on which the petition is founded, and a description of the premises sought to be mortgaged. The statute then further provides that foreclosures of mortgages authorized by this act shall only be made by petition to the County Court of the county where letters of guardianship were granted, or, in case of non-resident minors, in the county in which the premises, or some part thereof, are situated, in which proceedings the guardian and ward shall be made defendants.

The argument of the learned counsel for defendants, in support of the pleas, is that the state has supreme authority to legislate upon all matters of transmission and alienation of real property; that this power has been exercised by the passage of this statute; that the alienation of the premises in question by mortgage or trust deed is only authorized by this statute; that all the provisions of the statute, including that which relates to the enforcement of remedy by foreclos-

[1] Illinois Revised Statutes, Chap. 64, Sec. 24 *et seq.*

ure, were passed for the protection of the interests of minors, and became a part of the contract between the guardian and the person who made the loan and took the security; that the complainant, as the mortgagee or holder of the trust deed, was bound by the state statute, and that the Federal Court is also bound to follow the statute in determining questions relating to the enforcement of complainant's remedy upon his mortgages.

No question is involved as to the citizenship of the parties. The plaintiff is a citizen of Massachusetts, and the defendants reside in this state. The debt secured by the trust deeds is due. If remedy were to be sought in the State Courts in the form of foreclosure, it may be admitted that complainant would be obliged to prosecute his foreclosure in the County Court where letters of guardianship were granted to the mortgagor.

At the time these trust deeds were executed the judiciary act of the United States declared that Circuit Courts of the United States should have jurisdiction where the matter in dispute, exclusive of costs, should exceed the sum of $500, provided the citizenship of the parties should be such as to warrant it, and I regard it a satisfactory answer to the position that the provisions of the state statute, including those relating to remedies, became part of the contract between the parties, that the statute of the United States which gave to complainant the right to prosecute his remedy in this court, was also, with even higher potency, a part of the contract.

Decisions of the Supreme Court bearing upon the question seem clearly to determine that even in a case where the right of action is originally derivable wholly from the state statute, which also designates the court in which such remedy may be enforced, state legislation cannot limit a party to the enforcement of his remedy in the court thus designated by the statute, provided the citizenship of the parties is such as

would otherwise authorize the prosecution of such remedy in the Federal Court.

In the case of *Railway Co. vs Whiton*, 13 Wallace, 285, there was a statute which declared a liability by a person or corporation to an action for damages when death ensues from a wrongful act, neglect or default of such person or corporation, and which statute contained a proviso that such action should be brought, for a death caused within the state, in some court established by the constitution and laws of the same. Here, although the right of action existed only by virtue of the statute, and only in cases where the death was caused within the state, the Supreme Court held that the proviso requiring action to be brought in the court of the state did not prevent a non-resident plaintiff from removing the action to a Federal Court and maintaining it there. The court said: "In all cases where a general right is thus conferred it can be enforced in any Federal Court within the state having jurisdiction of the parties. It cannot be withdrawn from the cognizance of such Federal Court by any provision of state legislation that it shall only be enforced in a State Court. The statutes of nearly every state provide for the institution of numerous suits for partition, foreclosure, and the recovery of real property in particular courts and in the counties where the land is situated, yet it has never been pretended that limitations of this character could affect, in any respect, the jurisdiction of the Federal Court over such suits, where the citizenship of one of the parties was otherwise sufficient."

In this state there was formerly, and is perhaps at present, a statute declaring in substance that all actions against any county may be commenced and prosecuted in the Circuit Court of the county against which the action is brought, and the question arose whether a citizen of another state could prosecute a suit in this court against the supervisors of Mercer county upon certain bonds issued by them on behalf of the county. A motion to dismiss the case for want of

jurisdiction having been overruled in this court, and the case being removed to the Supreme Court, it was held by that court that there was no doubt of the constitutional right of the party to bring suit in the Circuit Court of the United States upon the obligations of the county of Mercer, notwithstanding the statute before referred to. *Cowles vs. Mercer County*, 7 Wallace, 118. And in the case of *Ex Parte Biddle*, 2 Mason, 472, which was a proceeding by partition existing only by virtue of the laws of Massachusetts, the court said: "Parties entitled to sue in the courts of the United States are, in general, entitled to pursue in such courts all the remedies for the vindication of their rights which the local laws of the state authorize to be pursued in its own courts."

Again, in the case of *Warren vs. The Wisconsin Valley R. Co.*, 6 Bissell, 429, it was said, in the opinion of the court, that "it was the intention of Congress, under the power conferred by the Constitution, to give to suitors having a right to sue in the Federal Courts remedies co-extensive with such rights. These remedies cannot be abridged or controlled by state legislation, by exempting a person or corporation of such state from suit. A citizen of another state, in this respect possesses a right not pertaining to one of the same state."

Upon the argument, counsel earnestly pressed upon the consideration of the court a distinction between these cases and the case at bar, the distinction consisting in the fact that in the present case the subject-matter involved is real estate; and the point was urged that, as the state must be held to have controlling authority in regulating the transmission and alienation of real property situated within the state, the Federal Courts are limited in their right to exercise jurisdiction in proceedings which contemplate the ultimate transfer of title of such character of property. But I am unable to perceive solid foundation for such distinction. The question is one involving the right to pursue a remedy. The statute of the United States, at the time of the execution of these trust

deeds, declared that the Circuit Court of the United States should have cognizance concurrent with the courts of the several states of all suits of a civil nature, at common law or in equity, with a proviso as to the citizenship of the parties. No state legislation could take away the right thus granted by Congress under the Constitution of the United States. And if, in the case where a right of action, whether it pertain to persons or property, exists only in virtue of, and is solely derivable from, a statute of a state, that statute also declaring that the remedy to enforce such right shall be brought in a court of the state,—if, I say, in such a case the remedy may be enforced in a court of the United States, as has been distinctly held, I am unable to perceive why, in a case like that in hand, the remedy may not also be pursued in the Federal Court, notwithstanding the state statute. That statute, in my opinion, can only be construed as limiting the right of the party to pursue his remedy in a particular forum, where such remedy is sought to be enforced in the courts of the state.

The pleas will be overruled.

E. P. ALLIS *et al.* vs. JOHN M. STOWELL.

CIRCUIT COURT—EASTERN DISTRICT OF WISCONSIN—DECEMBER, 1880,

IN EQUITY.

1. EQUITY PLEADING—RULE 66.—A suit will not be dismissed under the sixty-sixth rule in equity, for want of a replication to an amended answer, where a motion is pending to strike such answer from the files for irregularity and insufficiency.

2. EQUITY PRACTICE.—Where a rehearing has been granted and leave given to file an amended answer setting out newly discovered matter, it is not necessary to obtain leave of court to make a motion to strike such answer from the files for non-compliance with the order.

W. G. Rainey, for complainants,

E. H. Bottum, for defendant.

DYER, J.—This is a bill to restrain the infringement of two patents for saw-mill dogs, known as the Selden and Beckwith patents. On a previous hearing upon bill, answer and proofs, a decree was entered in favor of complainants, sustaining the validity of both patents. Subsequently the defendant moved that the cause be opened for a rehearing on the ground of newly discovered evidence. The court granted a rehearing as to the Selden patent, but denied it as to the Beckwith patent, and it was ordered that the defendant have leave to amend his answer as prayed in said petition for a rehearing. By this order it was intended and understood that the controversy between the parties should be reopened, but only to let in the newly discovered matter, and to the extent only that the Selden patent might be thereby affected. The defendant filed an amended answer,

which set up the new matter relied on to defeat the Selden patent, and also embraced all the original defenses to both patents. The complainants then filed a motion to strike the answer from the files for the reason that it was not limited in form and substance to the new matter, and therefore was not such an answer as the order for a rehearing authorized. The defendant then moved to dismiss the suit, under the sixty-sixth rule in equity, for the reason that no replication had been filed to the amended answer, and this is the motion now to be decided.

It is claimed by counsel for defendant that if the complainants desired to raise any question as to the regularity or sufficiency of the amended answer, they should have excepted to it; that a motion to strike from the files is irregular and cannot be entertained; and that as the answer was not excepted to, and a replication was not filed, he is entitled to have the suit dismissed, as of course, under the rule.

It is not intended now to pass upon the merits of the motion to strike the amended answer from the files. The only question to be presently determined is, Is the defendant entitled, in the face of that motion, to have the suit dismissed for want of a replication? In other words, is the complainant in default so as to entitle the defendant to such action by the court as he invokes? It must be presumed that the motion to strike the amended answer from the files was made in good faith, and an inspection of the answer shows that it contains all the defenses which appeared in the original answer, in addition to those embraced in the new matter, on account of which a rehearing was granted. Whether this form of pleading, in the present attitude of the case, be regular or not, I do not, as before remarked, now decide. But it seems very clear that the court cannot treat the motion to strike the amended answer from the files as such an act of non-conformity to correct practice as leaves the complainants in default, and as entitles the defendant to a dismissal of the suit for want of a replication. Rule 66

provides that "whenever the answer of the defendant shall not be excepted to, *or shall be adjudged or deemed sufficient*, the plaintiff shall file the general replication thereto on or before the next succeeding rule day thereafter. * * * If the plaintiff shall omit or refuse to file such replication within the prescribed period, the defendant shall be entitled to an order, as of course, for a dismissal of the suit."

So it appears that if the answer shall be excepted to, or shall be adjudged *or deemed insufficient*, a replication is not to be filed. And I do not think that the only method that may be pursued to test the sufficiency or regularity of an answer, is that of filing exceptions. Where a question is presented like that here involved, I am of opinion that it may be raised by motion to strike the answer from the files, and the rule does not necessarily exclude such a course of procedure.

Whether or not, in a given case, exceptions should be filed, or a motion should be made to strike the pleading from the files, may depend upon the character of the objections which are made to the pleading. Authority upon the correct course of practice is meager, but in *Strange vs. Collins*, 2 Veasey & Beames, 163, it was held by Lord ELDON that where a supplemental answer contained not only the new matter which the party had obtained leave to allege, but also other matter which was contained in a former answer, the supplemental answer could be ordered off the file, on motion. In the case at bar, the pleading involved is an amended and not a supplemental answer, but that ought not to make any difference in the application of a rule of practice.

It is understood to be true, as claimed by counsel for defendant, that exceptions to the answer could not, in the present aspect of the case, be filed without leave. *Barnes vs. Tweddle*, 10 Simons, 481. But I hardly think that leave of the court was a necessary pre-requisite to a motion to strike the pleading from the files. On the whole, I am of the

opinion that whether that motion can be ultimately sustained on its merits or not, the complainants cannot be regarded as in such default for want of a replication as to entitle defendant to a dismissal of the suit.

The motion to dismiss will be denied; and, as it seems desirable that proper issue in the cause shall be joined without unnecessary delay, the motion to strike the answer from the files may be brought to a hearing on ten days' notice by either party.

OSCAR BIERBAUER vs. LEOPOLD WIRTH *et al.*

CIRCUIT COURT—EASTERN DISTRICT OF WISCONSIN—DECEMBER, 1880.

1. CONTRACT TO EVADE PROCESS OF COURT IS VOID.—Defendants agreed with plaintiff to pay him a salary and his expenses while keeping himself without the jurisdiction of the court, in order to evade service of process: *Held*, that the agreement was void as against public policy and no recovery could be had thereon.

2. MONEY EXPENDED AT REQUEST.—In such case the plaintiff could not recover his expenses as money expended at the request of the defendants. The law will go behind the request to unravel the transaction and discover its origin.

J. C. McKenney, for plaintiff.

Jenkins, Elliott & Winkler, for defendants.

Motion for a New Trial.

Bierbauer vs. Wirth.

DYER, J.—The question to be determined in this case arises on a motion for a new trial. The action is one brought by the plaintiff to recover for services rendered and disbursements alleged to have been made by him between the first day of April, 1875, and the first day of December, 1876, for the defendants who were the managers of a rectifying and redistilling establishment at Milwaukee. At the trial, it was disclosed by the evidence introduced on the part of the plaintiff that about the first day of April, 1875, he was employed as book-keeper at the defendants' place of business; that he rendered legitimate services as such book-keeper from that day until the tenth day of May, 1875, when the defendants' establishment, together with a large number of distilleries and rectifying houses in Milwaukee, were seized by the Government for frauds upon the revenue. It appeared from the testimony given by the plaintiff himself that in the evening of the day of the seizure he made an arrangement with the defendants, or some of them, by which he was to go out of the jurisdiction of this court, so that he could not be reached by its process, and his attendance compelled as a witness in behalf of the Government and against the defendants, in forfeiture and criminal proceedings, which it was expected would follow the seizures, and that he should remain away until such proceedings should be terminated. It appeared, further, that the defendants promised him that in consideration of such service the salary agreed to be paid him in his original employment should continue, and that all expenses he might incur during his absence, and consequent upon carrying out the arrangement on his part, should be repaid to him. Pursuant to this understanding, and more or less under the direction of the defendants, the plaintiff immediately went away, and thereafter traveled in various parts of the United States and Canada, sometimes under an assumed name, and sometimes not, and thus continued absent, for the purpose of avoiding the process of this court, until December 1876,

when he returned. Most of the services and disbursements, for which this suit was brought, are those which the plaintiff claims he thus rendered and paid during the period of his absence under the circumstances mentioned.

At the trial it was held that the contract between the plaintiff and defendants, except for the service actually rendered as book-keeper between April 1, and May 10, 1875, was one which, if executed, tended to obstruct the course of public justice; that, consequently, it could not receive judicial sanction, or even toleration, and that the plaintiff could not recover either for the service he rendered the defendants in thus avoiding the jurisdiction and process of the court, nor the moneys he expended in carrying out such an unlawful enterprise. On the argument of the present motion it is not contended that there was any error in the ruling of the court as to the plaintiff's claim for services. Indeed, the case in its facts and circumstances, as disclosed by the plaintiff himself, is so flagrant that there can be, and ought to be, no ground upon which to base a right to recover for such a service. "Courts owe it to public justice, and to their own integrity, to refuse to become parties to contracts essentially violating morality or public policy by entertaining actions upon them. It is judicial duty always to turn a suitor upon such a contract out of court, whenever and however the character of the contract is made to appear." *Wight vs. Rindskopf*, 43 Wisconsin, 348; see, also, *Badger vs. Williams*, 1 Chipman, (Vt.) 137, and *Valentine vs. Stewart*, 15 California, 387.

But it is insisted that the plaintiff is entitled to recover the amount of his actual expenses incurred and paid while absent at the instance and request of the defendants. The argument in support of the point is that as the moneys so expended were paid out at the request of the defendants, the law will imply a promise to repay them, and that it is not necessary to go behind such request and implied obligation, and show the character of the employment which made

the expenditure necessary; and *Armstrong vs. Toler*, 11 Wheaton, 258, and *Planters' Bank vs. Union Bank*, 16 Wallace, 483, are relied on in support of the plaintiff's claim to recover the moneys he has actually paid. Of the first-named case it is sufficient to say that it holds no more than that if an illegal act *is not the consideration of a contract, and is entirely disconnected from it*, the contract is valid, though the occasion for making it arose out of the existence of the illegal act. In the opinion of the court various cases arising in England are cited, all or most of which were cases where there were new and subsequent contracts between the parties, not stipulating a prohibited act, and entirely disconnected from a previous illegal act, although they were contracts for the repayment of money originally advanced in satisfaction of an unlawful transaction; and in which cases it was held that such new, subsequent, and independent contracts might be sustained in a court of justice; and the point of law decided in the principal case is that a subsequent independent contract, founded on a new consideration, is not so contaminated by an illegal act which lies back of the contract itself as to render it unworthy of enforcement by the court.

The case of the *Planters' Bank vs. Union Bank* was similar in principle. It was there held that "though an illegal contract will not be enforced by courts, yet * * * * where such a contract has been executed by the parties themselves, and the illegal object has been accomplished, the money or thing which was the price of it *may be a legal consideration between the parties for a promise, express or implied*, and that the court will not unravel the transaction to discover its origin." The alleged illegal acts in question in the case cited were not acts involving moral turpitude. They were not acts *mala in se*. One question involved and illustrating the character of the case was whether an action would lie for the proceeds of the sale of confederate bonds which had been sent by the plaintiff bank to the defendant

bank for sale, and which had been sold by that bank and the proceeds carried to the credit of the plaintiff. And the court say: "It may be that no action would lie against a purchaser of the bonds or against the defendants on any engagement made by them to sell. Such a contract would have been illegal. But when the illegal transaction has been consummated; when no court has been called upon to give aid to it; when the proceeds of the sale have been actually received, and received in that which the law recognizes as having had value; and when they have been carried to the credit of the plaintiffs, the case is different. The court is there not asked to enforce an illegal contract. The plaintiffs do not require the aid of any illegal transaction to establish their case. It is enough that the defendants have in hand a thing of value that belongs to them."

The case at bar is plainly distinguishable from both this case and *Armstrong vs. Toler, supra.* Here the court is called upon to give aid to the enforcement of an unlawful contract. The agreement to reimburse the plaintiff his expenses incurred in keeping himself beyond the process of the court was as much infected with the taint of immorality and illegality as was the promise to pay a compensation for the service. It is not the case of a subsequent independent contract between the parties to pay the moneys here claimed, founded on a new consideration and disconnected from the illegal act. It is not the case where an illegal object was accomplished, and the money which was the price of it was then made the consideration for a new promise, express or implied. The defendants in effect said to the plaintiff if you will do certain acts for the purpose of obstructing public justice we will compensate you for the service and reimburse you the expenses you incur in doing them. Upon this promise the plaintiff acted and paid out his money. Upon this promise necessarily rests his right of action, and so it becomes essential, in showing the consideration for the promise, to "unravel the transaction and discover its origin." There

was no other consideration for the expenditure of the moneys than the original unlawful consideration. On the faith of the agreement which the plaintiff made with the defendants he advanced the moneys which he seeks to recover. The whole transaction was illegal, and the plaintiff having thus voluntarily put himself in a position where he was exposed to the liability of loss, he cannot ask the court to extricate him from that position.

Motion for a new trial denied.

WASHBURN & MOEN MANUFACTURING COMPANY AND ISAAC L. ELWOOD vs. JACOB HAISH.

WASHBURN & MOEN MANUFACTURING COMPANY vs. SAME.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—DECEMBER, 1880.

IN EQUITY.

1. PATENTS—ASSIGNMENT—AMBIGUITY.—An assignment of all right, title and interest in letters patent "excepting thirty-two or thirty-three counties heretofore sold and assigned" is not necessarily void for ambiguity.

2. RE-ISSUE—PRESUMPTION OF TITLE.—The re-issue of a patent to the assignee of the patentee, raises a presumption of title in such assignee.

3. DEFEAT OF PATENT FOR PRIOR USE—BURDEN OF PROOF.—In order to defeat a patent on the ground of user of the patented article, prior to the issuance of the patent, it must be shown that the article so relied upon as a defense, was complete and capable of producing the result attained by the patented article, and the burden of proof rests upon the one seek-

ing to overthrow the patent. Every reasonable doubt should be resolved in favor of the patentee.

4. DEGREE OF INVENTION REQUIRED.—Though a device, in order to be patentable, must be the result of inventive genius, yet if invention is required at all in the production of the device, the law will not attempt to measure its extent or degree.

5. UTILITY, EVIDENCE OF INVENTION.—The acceptance of a new device or combination by the public and putting it into extensive use is evidence that it was the product of invention.

6. CONSTRUCTION—STATE OF ART—OBJECT OF INVENTOR.—In order to give a proper construction to a patent and its re-issue, the state of the art and the object which the inventor proposed to accomplish must be considered.

7. BARBED WIRE FENCE.—It required invention to devise and produce a barbed wire which could be practically used for fencing purposes.

8. SAME—LIMITATION OF PATENTS.—But in view of the state of the art, it was not competent for any inventor to claim more than his own special method of forming and affixing the barb he had devised.

9. RE-ISSUE—SPECIFICATIONS.—An inventor may in his specifications on the re-issue of his patent, make the description more full and accurate; but he must not substantially change it so as to describe another device, or cover anything not in the original.

10. RE-ISSUE OF PATENT.—Where there was a claim for a device in the re-issue of a patent, which was not made in the original, but the device was clearly shown in the drawings accompanying the original: *Held*, that the re-issue was valid.

11. HUNT PATENT—LIMITATION OF RE-ISSUE—SPUR WHEEL BARBS.—The original Hunt patent of July 23, 1867, was for a method of "providing the wires of a wire fence with a series of spur wheels." The re-issued patent No. 6,976, dated March 7, 1876, was for a "wire fence provided with spurs:" *Held*, that the re-issued patent is valid, but cannot be enlarged to include every kind of barb which may be attached to fence wire, and must be limited to the fence wire and spurs described in the original patent.

12. KELLY PATENT, No. 74,369.—The Kelly patent, issued February 11, 1868, was for thorns or barbs fixed rigidly to the wires, so that they could neither slide lengthwise nor revolve upon the wires. The mode of accomplishing this was described to be by stringing them upon the wires by holes through the center and then compressing them upon the wire by blows or pressure. In the re-issue of February 9, 1876, the same result was described as accomplished by "laying another wire of the same or different size alongside the thorn wire and twisting the two together:" *Held*, that the re-issue was valid.

13. GLIDDEN PATENT, No. 150,683.—The Glidden patent was issued May 12, 1874, and re-issued February 8, 1876. In the re-issue was a claim for a barb made by coiling a short piece of wire between its ends around the fence wire: *Held*, that though this feature was not claimed in the original

patent, yet as it was shown in the original specifications and drawings, the patent was properly re-issued to cover this device.

14. GLIDDEN PATENT, No. 157,124.—The Glidden patent issued November 24, 1874, was for a "twisted fence wire, having the transverse spur wire, D, bent at its middle portion about one of the wire strands of said fence wire, and clamped in its position and place by the other wire strand twisted upon its fellow, substantially as specified:" *Held*, that at that time there was nothing left in the line of invention to justify the issue of this patent, and that it was void.

15. INFRINGEMENT.—The defendant manufactured a twisted fence wire armed with a wire barb, cut diagonally so as to leave the points sharp, and bent in the form of a letter "S," so as to clasp both wires, and extend the sharp points in opposite directions from the wire: *Held*, that this was an infringement upon the Hunt and Glidden patents.

16. Many cases referred to and examined.

Coburn & Thacher, *Thomas H. Dodge*, *Benjamin F. Thurston*, *Offield & Towle*, *West & Bond*, *Lawrence*, *Campbell & Lawrence*, *Charles Mason*, *Hiram P. Dillon* and *Miller & Godfrey*, for complainants.

George Payson, *N. C. Gridley*, *Munday & Evarts*, *George Christy* and *Albert H. Walker*, for defendant.

Before DRUMMOND and BLODGETT, JJ.

Opinion by BLODGETT, J.—These are two of a series of fourteen cases brought by the plaintiff upon the chancery side of this court for an injunction and damages by reason of the alleged infringement by defendant of certain patents owned by the complainants, relating to barbed fence wire. By the first suit the plaintiffs allege that they are the owners of the following patents, issued by the United States:

1. Patent No. 67,117, issued July 23, 1867, to William D. Hunt, and re-issued, No. 6,976, March 7, 1876, to Charles Kennedy, assignee of William D. Hunt.

2. Patent No. 150,683, issued May 12, 1874, to Joseph F. Glidden, and re-issued, No. 6,913, February 8, 1876, to said Glidden.

3. Patent No. 66,182, dated June 25, 1868, issued to Lucien B. Smith, and re-issued, No. 7,136, dated May 23, 1876.

4. Patent No. 157,124, dated November 24, 1874, issued to J. F. Glidden.

All of which patents, it is charged, have been duly assigned by *mesne* assignments to the plaintiffs, The Washburn & Moen Manufacturing Company and Isaac L. Ellwood.

The patents involved in the second suit are as follows:

1. Patent No. 74,369, issued to Michael Kelly, dated February 11, 1868, and re-issued, No. 6,902, dated February 9, 1876.

2. Patent No. 84,062, dated November 17, 1868, issued to Michael Kelly, and re-issued, No. 7,035, dated April 4, 1876.

3. Patent No. 163,965, issued to Charles Kennedy, dated August 11, 1874.

The title to all of which patents has, it is claimed, been, by *mesne* assignments from the respective patentees, duly vested in the complainant, The Washburn & Moen Manufacturing Company.

The defenses set up are:

1. A denial of the patentability of the devices in question, because from the state of the art it only required mechanical skill, and not inventive genius, to construct them.

2. A denial of the validity of said patents for want of novelty, on the ground that barbed wire had been publicly known and used long prior to the alleged inventions.

3. A denial of the validity of the several re-issued patents, for the reason, it is insisted, that the inventions now claimed by the re-issues are not found in the original specifications, drawings and models.

4. That, even admitting the validity of the letters patent, the defendant does not infringe the same, nor any of them.

5. A denial of the complainants' title to the Hunt patent, and their right to maintain this suit upon the title shown.

With regard to the last point named, raising the question of title to the Hunt patent, it is sufficient, we think, to say, that the objection comes too late to be considered upon the merits of the cause. In the assignment by Hunt of his

interest in the original patent, he purports to convey all his right, title and interest in the said letters patent, "excepting thirty-two or thirty-three counties heretofore sold and assigned," not designating the counties thus previously sold and assigned; and the defendant insists that the conveyance by Hunt is so far ambiguous as that nothing passes by this assignment, because it is uncertain what counties were so reserved or had been previously conveyed. We think it enough to say that this reservation is such as is capable of being made certain by competent evidence, showing what counties had been actually conveyed by Hunt. The bills allege that certain counties in certain states were the ones upon which the exception operated, and the answers do not traverse or deny this allegation. Besides this, since the assignment from Hunt was made this patent has been reissued to Hunt's assignee, and we think it must be presumed that the title was fully exhibited to the Patent Office at the time of such re-issue; at least that a re-issue to the assignee of Hunt raises a presumption of title in the assignee. If the defendant wished to raise the question as to whether the reservation included the territory now in controversy, he should have raised it by his answer, or at least have put in proof tending to show that the title to some part of the territory involved in this suit was not conveyed by the original assignment from Hunt.

A large mass of testimony has been put into the cases bearing upon the question of novelty and the state of the art at the time these inventions are claimed to have been made. The defendants have introduced voluminous proofs tending to show the public use of barbed wire for fencing purposes long prior to any of these alleged inventions. We will not take the time to examine these proofs in detail, but dispose of that branch of the case by saying that these proofs fail to satisfy us that barbed wire for fencing purposes had ever been publicly known or used prior to these inventions in such manner as to defeat these inventions for want of

novelty. We do not intend to be understood as intimating that the witnesses who have testified to the various instances of the use of barbed wire for fencing purposes have been guilty of intentional false swearing, but simply to say that this proof, which is almost wholly made up of the recollections of witnesses revived after the lapse of many years, and contradicted, as it is in most instances, by the explicit testimony of other equally credible witnesses, leaves so much doubt as to the actual existence of these various barbed wire fences, or any of them, as to make it at least unsafe ground on which to defeat a patent. The rule as to the degree of proof required to defeat a patent by showing prior use is well stated in the following authorities:

In *Coffin vs. Ogden*, 18 Wallace, 120, the opinion having been delivered by Mr. Justice SWAYNE, it is said:

"The invention or discovery relied upon as a defense must have been complete and capable of producing the result sought, and this must be shown by the defendant. The burden of proof rests upon him, and every reasonable doubt should be resolved against him."

So, too, Judge WHEELER, in the case of *Webster Loom Co. vs. Higgins*, 16 Official Gazette, 675, says: "The burden of proof rests upon the defendant to show beyond any fair doubt the prior knowledge and use set up."

In *Howe vs. Underwood*, 1 Fisher's Patent Cases, 175, Judge SPRAGUE said:

"How invariable is it that after a great invention has been brought before the world, has become known to the public, and been put in form to be useful, that people start up in various places and declare that they invented the same thing long before. The cotton gin and the ether discovery are illustrations in point; and others of similar character might be added, indefinitely. These pretended prior inventors had thought of such a thing; they had the conception of such a thing, perhaps; but they had never carried it to the extent of making it of practical utility, so that the

world could obtain possession of it. But when they find that another has completed that which they had begun, they are astonished that they did not see—think they must have seen all that is necessary—and claim that they have invented it. After having seen what has been done, the mind is very apt to blend the subsequent information with prior recollections, and confuse them together. Prophecy after the event is easy prophecy. I think that this is one of the cases in which several of the witnesses have been led into the illusion of believing that they knew before what they have learned or been taught."

The same learned judge, in *Hayden vs. Suffolk Manufacturing Company*, 4 Fisher, 103, said: "Where an invention of any useful machine, or structure, or improvement in any machine is shown to have been made, and it is sought to be invalidated by an old machine made years ago, the jury should examine the testimony and the evidence with care and caution, so as to be satisfied that that which is said to have existed was actually and substantially the same. * * *

"The rule of law is a reasonable one; at all events, it is a rule of law, that a party that sets up such an old instrument that has passed away has upon him the burden of satisfying the jury, upon a preponderance of evidence, that it is substantially the same as what has taken place, before they will set aside the patent."

So in *Goodyear vs. Day*, 2 Wallace, jr., 283, Mr. Justice GRIER says: "It is usually the case, when any valuable discovery is made or any new machine of great utility has been invented, that the attention of the public has been turned to that subject previously, and that many persons have been making researches and experiments. * * * Many experiments may have been unsuccessfully tried, coming very near, yet falling short of the desired result. They have produced nothing beneficial. The invention, when perfected, may truly be said to be the culminating point of many experiments, not only of the inventor, but by many

others. He may have profited indirectly by the unsuccessful experiments and failures of others, but it gives them no right to claim a share of the honor or the profit of the successful inventor."

The testimony as to the state of the art shows that fence wire and wire fences, and wires for such purposes, composed of two or more strands twisted or laid together, were old at the time these inventors entered the field; also, that fences had been, long before Hunt's invention, armed with spikes or other sharp projecting points, for the purpose of making them more effective in resisting the encroachments of animals or other intruders. Indeed, the thorn hedges, which have been used almost from time immemorial, are in one sense only a barbed fence, their effectiveness as a barrier arising mainly from the natural thorns or spurs with which the hedge shrubs are armed. It must be conceded, both from the proofs in these cases and from those common facts within the knowledge and observation of all intelligent persons that the idea of furnishing a fence or wall with some kind of sharp spikes or prickers is old. The ordinary picket fence; the device of spikes on area railings to prevent loungers from leaning against them; the placing of broken glass, pottery or sharp stones or spikes upon the tops of walls to protect fruit gardens are well-known illustrations of what we refer to. The most that can be said of these old devices as applicable to these patents is, that they narrow the field for the exercise of inventive faculty, and limit the range of the patents.

In this connection it is proper to consider briefly the objection that these devices are not patentable from the fact that in view of what was well known in the same direction it did not require inventive genius to make any of the devices involved in these patents; but that only mechanical skill was requisite to adapt old devices to this new use.

There is no doubt that a device, in order to be patentable, must be the result of invention. The mere mechanical

adaptation of old things to new uses is not usually invention, unless in combination; and yet it is extremely difficult, in many cases, to say just where the inventive faculty asserts itself as the controlling force. And the authorities furnish us no satisfactory test to apply and determine this question. Although there is usually little difficulty in determining as a matter of fact in each case, whether a device is or is not in some degree the result of invention, if there is any invention required, then the law will not attempt to measure its extent or degree. If, for instance, the proof had shown that wire provided with barbs, spurs, or prickers was a well-known article, used for other purposes than fencing, there would be no difficulty in saying that it did not require invention, or the exercise of the inventive faculty, to substitute it for fencing purposes, in place of plain wire, which had been used before. But we cannot say that the inventive or creative faculty is not required in devising a mode by which plain fence wire can be armed with spurs, so as to make it available as a more effective fencing material. The proof does not show that such wire was known, and applied to other uses. No one, so far as this record shows, had made or used it before for any other purpose; so that, to our minds, it seems quite clear that it required invention to devise and produce a barbed wire which could be practically used for fencing purposes. In the absence of any other test, the courts have seemed to assume that the fact of the acceptance of a new device or combination by the public, and putting it into extensive use, was evidence that it was the product of invention. Or, as one of the counsel for plaintiff expressed it, "utility is suggestive of originality."

In *Smith vs. Goodyear Dental Vulcanite Company*, 3 Otto, 486, Mr. Justice STRONG said:

"Undoubtedly the result or consequences of a process or manufacture may in some cases be regarded as of importance when the inquiry is whether the process or manufacture exhibits invention, thought and ingenuity." Webster, on

the Subject Matter of Patents, page 30, says: "The utility of the change, as ascertained by its consequences, is the real practical test of the sufficiency of an invention, and since the one cannot exist without the other, the existence of the one may be presumed on proof of the existence of the other. Where the utility is proved to exist in any degree, a sufficiency of invention to support the patent must be presumed. We do not say the single fact that a device has gone into general use, and has displaced other devices which had previously been employed for analogous uses, establishes in all cases that the later device involves a patentable invention.

"It may, however, always be considered; and, when the other facts in the case leave the question in doubt it is sufficient to turn the scale."

So in *Eppinger vs. Richey*, 14 Blatchford, 307, Judge SHIPMAN said: "Two facts exist in this case: One is that an important improvement has been attained. The second is that the improvement is in a staple article which has been manufactured in this country for a long series of years. * * * The utility of the patented article has been evinced by its large sales. * * * The inventor evidently gave to the public an article which it wanted, and which it had not previously known. Without giving to the general use of the invention, as a test of its patentability, any greater importance than the Supreme Court in the case of *Smith vs. Goodyear Dental Vulcanite Company* [above quoted] indicate should be given to this circumstance, I am of the opinion that the facts in the case fully establish the conclusions: (1.) That however simple the change in the method of manufacture apparently may have been, yet it was a change which required invention for its accomplishment. (2.) That the improvement resulting from the changed method of manufacture has been so great that the article which is produced is, within the meaning of the patent acts, a new and useful article of manufacture."

Mr. Justice SHEPLEY said, in the case of *Isaacs vs. Abrams*,

14 Official Gazette, 862: "A change in the form of a machine or instrument, though slight, if it works a successful result, not before accomplished in a similar way in the art to which it is applied, or in any other, is patentable."

Judge SHIPMAN said, in *Stanley Works vs. Sargent*, 8 Blatchford, 346: "Utility is not an infallible test of originality. The patent law requires a thing to be new as well as useful, in order to entitle it to the protection of the statute. To be new in the sense of the act it must be the product of original thought or inventive skill, and not a mere formal or mechanical change of what was old and well known, but the effect produced by the change is often an appropriate though not a controlling consideration in determining the character of the change itself."

Tested by the rule of utility here suggested, this record abundantly shows that the device in question has been accepted by the public to an extent which has hardly heretofore followed the most successful inventions. Its utility must be considered as a conceded fact. From what has already been developed, it is clear that it has made possible the cultivation of the extensive prairies of the West, the pampas of Brazil, and the steppes of Russia, where before the introduction of this cheap mode of fencing it was impossible; and it has, even to a great extent, already superseded the use of wooden fences in the timbered portion of the country; and the question is, To whom but these inventors is the public indebted for this widely useful device?

The third objection, that the re-issues are invalid, involves a consideration of the original patents in their order, and those patents as they now stand amended and re-issued.

The Hunt patent of July 23, 1867, was for his method of "providing the wires of a wire fence with a series of spur wheels." The re-issued is for "a fence wire provided with spurs for the purpose specified." In other words, what Hunt at first claimed as his invention, and obtained a patent for, was his special mode of arming the wires of a wire

fence, with spur wheels or barbs; but in his re-issue, he claimed as his invention a barbed fence-wire as a new article of manufacture, and it is argued that while he may have been the first to place this particular kind of spur or barb on a fence-wire, and may have been entitled to a patent for such specific device, yet he nowhere claimed to be the inventor of barbed or spurred wire as such, and therefore his broad claim in the re-issue should not have been allowed, and cannot be sustained.

It is not deemed necessary to attempt here any full discussion of the law in regard to the re-issue of patents. It is enough to state, as a general rule, that what is claimed in the re-issue must be found in the original specifications, drawings, and models; that is, "no new matter can be introduced into the specifications." The invention as claimed in the re-issue must be found properly described in the original specifications. In the language of the Supreme Court, in *Powder Company vs. Powder Works*, 8 Otto, 138, "The specifications may be amended so as to make it more clear and distinct, the claim may be modified so as to make it more conformable to the exact rights of the patentee, but the invention must be the same. So particular is the law on this subject that it is declared that no new matter shall be introduced into the specification. This prohibition is general, relating to all patents; and by 'new matter' we suppose to be meant new substantive matter, such as would have the effect of *changing the invention*, or of introducing what might be the subject of another application for a patent. The danger to be provided against was, the temptation to amend a patent so as to *cover* improvements which might have come into use, or might have been invented by others, after its issue. The Legislature was willing to concede to the patentee the right to amend his specification so as fully to describe and claim the very invention attempted to be secured by his original patent, and which was not fully secured thereby in consequence of inadvertence, accident, or mistake; but was not

willing to give him the right to patch up his patent by the addition of other inventions, which, though they might be his, had not been applied for by him, or, if applied for, had been abandoned or waived."

So in *Russell vs. Dodge*, 3 Otto, 463, Mr. Justice FIELD said:

"And as a re-issue can only be granted for the same invention embraced by the original patent, the specification could not be substantially changed, either by the addition of new matter or the omission of important particulars, so as to enlarge the scope of the invention as originally claimed. A defective specification could be rendered more definite and certain, so as to embrace the claim made, or the claim could be so modified as to correspond with the specification."

The doctrine of these authorities is that the inventor may in his specifications on the re-issue make his description more full and accurate; but he must not substantially change it so as to describe another device, or cover anything not in the original.

It would seem from the specification, and testimony of Hunt, that his idea of the mode of utilizing his device was for the user to purchase the spurs and fix them upon such of the wires composing his fence as he thought desirable; but experience demonstrated that the value of the invention consisted not in teaching each fence-builder how to barb his own wire, but in the introduction of barbed wire as an article of manufacture, and in furnishing to the consumer the manufactured article ready for use without further need of mechanical skill, or the use of tools to fit it for its purpose beyond the single act of fastening it to the posts. It can hardly need evidence or argument to prove that Hunt's device is much more accurately described as "barbed fence wire," than as a method of barbing wire; and if he was the first to suggest the idea of barbing wire for fence purposes, he had the right to cover that by his patent. The specifications in the original and re-issued patent are substantially the

same. No material change is introduced, and whatever change is made is merely that of giving point or direction to the invention now claimed.

It is true that in his specifications, original and amended, Hunt describes his invention as "an improvement in fences," but this is no part of the substance of his specifications, but only the mere name which he chose to give to his device. Nor do we see any reason why Hunt, having described his method of barbing fence wire, might not have had the broad claim in his original which he obtained in his re-issue; and if he could have had it in the first instance, he certainly had the right to it in the re-issue. Hunt then, for the purpose of this case, must be deemed to have been the first to enter the field as an inventor of barbed-wire fencing. Others, who followed him, may have patents, subject to his, for improvements. His mode of barbing his wire was by a spur wheel revolving loosely on the wires, or by single spurs strung upon the wire by holes punched through them. These spurs may have been expensive to manufacture, or affix to the wire, but that only went to the practicability of adopting his device, in competition with other fencing material then in use, and not to its novelty.

The next patent, in order of time, involved in this controversy, is that issued June 25, 1867, to Lucien B. Smith, which, although earlier in matter of date than Hunt's, yet is of later conception, Hunt's invention going back to 1865. The only advance made in the art, by Smith's invention, was the idea of fixing the barbs by the short kinks, or bends in the wire, so as to prevent them from moving lengthwise on the wire. So far as this device was an improvement on Hunt's, it may perhaps be held valid, but it cannot be held to include all equivalent methods of preventing lateral motion, because Hunt had suggested keeping the spurs at a suitable distance apart, by means of "flanges or otherwise." This Smith patent has been re-issued with a claim for the bent wires, as a means of preventing the movement of the

barb lengthwise thereon, and we do not see any well-taken objection to the re-issue; but the device seems of little importance in this case, as none of these defendants use it, or its equivalent. We only refer to it as showing another step toward the perfected wire as now used.

The next patent to be considered in the order of time is that issued to Michael Kelly, February 11, 1868. This patent was for thorns or barbs, fixed rigidly to the wires, so that they could neither slide lengthwise nor revolve upon the wires. Two modes of accomplishing this result are shown; one of stringing them upon the wires by holes through the center, and then compressing them upon the wire by blows or pressure, and the other by "laying another wire of the same or different size alongside the thorn wire and twisting the two together;" but no claim was made for the latter mode in the original patent. By the re-issue this feature is made the fourth claim, and, it seems to us, properly allowed under the law, as it was clearly described and suggested in the original specifications.

The second Kelly patent is for a flat wire, pierced with holes, through which spurs made of pieces of wire, with the ends cut diagonally so as to leave them pointed without further manipulation, were thrust, and by compressing the wire so as to clamp the barb thus inserted in each hole. The only feature of this patent which it is claimed affects this case is that it shows for the first time a wire barb made sharp or pointed at both ends by being cut off diagonally; but barbs had been before this time made sharp by cutting sheet metal diagonally, and it was certainly no invention for Kelly to point wire by cutting it diagonally after it had become a frequent practice to cut sheet metal in the same way for that purpose.

The Glidden patent of May 12, 1874, showed a device for keeping the wires of a fence stretched, or spread apart, by means of a slotted tube. It also showed, as part of the mechanism, a barb, made by coiling a short piece of wire

between its ends around the fence wire. This feature was not claimed in the original patent, but is claimed in the re-issue, as part of the invention, and as it is shown in the original specifications and drawings, the patent may be considered as having been properly re-issued to cover this device.

The second Glidden patent of November 24, 1874, is for a "twisted fence wire, having the transverse spur wire, D, bent at its middle portion about one of the wire strands of said fence wire, and clamped in its position and place by the other wire strand twisted upon its fellow, substantially as specified." The proof shows that the final form of fence wire and spur which has been adopted for practical use, is substantially that shown in the last Glidden patent; but it seems to us there was nothing left in the line of invention to justify the issue of this patent to Glidden, as an inventor. The idea of barbing fence wire was Hunt's. The idea of fixing the barb rigidly upon the wire, and holding it in place by another wire twisted upon it, was Kelley's. The wire barb looped over the wire, or one of the wires, was that of Glidden's earlier patent; and by grouping all these devices into one finished wire, a result is obtained substantially like that shown in the final Glidden patent of November, 1874. There was nothing new in Glidden's last patent, and no room for the claim of invention in the wire therein provided.

In the suits brought by the Washburn & Moen Manufacturing Company and Isaac L. Ellwood against Haish, the defendant is charged with infringement of the Hunt patent, the Smith patent, and the two Glidden patents. As already said, we consider the Smith patent and the last Glidden patent as unworthy of further consideration in connection with this case.

The proof shows that the defendant, Haish, manufactured a twisted fence wire, armed with a wire barb, cut diagonally, so as to leave the points sharp, and which is bent in the form of an "S," so as to clasp both wires and extend the sharp points in opposite directions from the wire.

Defendant claims that even if the Hunt, Kelly, and Glid-

den patents are valid, he does not infringe, because his barb differs essentially from the barb of either of the complainants' patents, mainly in the fact that it cannot be used except in combination with a wire of at least two strands. Assuming the validity of the re-issue of Hunt, Kelly, and Glidden, there can be no doubt that Haish infringes Hunt's claim for "a fence wire provided with spurs," or barbs. It also infringes Kelly's idea of a rigid or fixed barb, held in place by the twisting of two wires together; and Glidden's barb, made by bending a short piece of wire around the fence wire so as to leave the two sharp ends projecting to form the spurs or barbs.

Glidden's device for forming the barb is undoubtedly a very simple one, and rests very close to the border line between mechanical skill and invention. After Hunt had made barbs by cutting sheet metal into stars, or spur-pointed wheels to be strung upon the wire by a hole through the middle, the points of the spurs being necessarily obtained by cutting the metal diagonally at the periphery of his wheel; and after Kelly had shown his two-pointed barb strung upon the wire by means of a hole through the middle and held in place by another wire twisted upon the thorn-wire, it would seem to require but little invention to form the barb by bending a short piece of wire, pointed at both ends, around the fence wire, thereby forming a loop in place of the hole through the barb shown by Hunt and Kelly. The loop is, when made, only the hole which Kelly punched through his barb; and yet there can be no doubt that the wire barb shown by Glidden is much more readily made and attached to the fence wire than the Kelly barb, which must be first strung upon the wire by passing the end of the wire through the hole before it can be fastened or fixed in place thereon; and, as before remarked, if utility is one of the tests of invention, then we must conclude that this Glidden barb is the result of inventive ability, the proof showing clearly that it has been substantially adopted by all the

ing the barb. Glidden's shown by the proof to e earlier methods, and n once the idea of loop- he fence wire had been in such slight changes h barb. It is true the o clasp both wires, but e essential principle of ff for any reason it was rlying thought or prin- of bending it over or unching a hole through through the hole; and is obvious that a great which produce only one

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sion that complainants their bills; the princi- timation, fully covering cases before us.

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Motion for rehearing.
Decided February, 1881.

Coburn & Thacher, for complainants.

Munday, Evarts & Adcock, for defendant.

Before DRUMMOND and BLODGETT, JJ.

Opinion by DRUMMOND, J.—This is a motion for a rehearing for the alleged reason that the three re-issued patents considered in the former opinion—the Hunt, No. 6,976, Kelly, No. 6,902, and Glidden, No. 6,913—are invalid as not being for the same inventions as their respective originals.

In order to give a proper construction to these patents and their re-issues we must consider the state of the art, and the object which the inventors proposed to accomplish. Wires had been used for fencing for many years before the date of these patents, and they were made of single wires or of single wires twisted together. These did not fully answer the purpose, as it was not difficult for cattle to push through them. These inventors desired to place something on the wires which would deter stock from attempting to break through, and that was accomplished by arming them with barbs or sharp points which would prick the cattle. It would seem to follow from this statement of the case, and in view of the further fact that it had been common to arm various fences other than wire with points or prickers, that it was not competent for any inventor to do more than to claim his own special method of forming and affixing the barb which he had devised.

Applying these principles to the Hunt original and re-issued patent, we can give to them a proper construction. Hunt invented a particular kind of spur wheel, which he strung upon the wires of a fence, a description of which he gives in his original specifications. They were small spur wheels, the spurs being sharpened; the wheels were pro-

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spurs set forth in the specifications, and they are substantially the same as described in the original patent. In comparing the claim of the re-issue with that of the original, we assume they mean substantially the same thing, and that the claim in the re-issue cannot fairly be enlarged to include every kind of barb that may be attached to a fence wire, but that "the fence wire provided with spurs" means the kind of fence wire and of spurs that he had described in his specifications and drawings. The claim in the re-issue ought, in this case, to be construed with reference to the limitation of the invention in the original patent.

The difference of the phraseology in the original and re-issued specifications, where in the former it says, "the spurs fit the wire loosely, so as to revolve easily upon it; * * * the spurs may be kept in their places and at suitable distances apart by means of flanges or otherwise;" and in the latter, "the spur wheels *may* fit the wire loosely, so as to revolve easily upon it, or they may be kept in their places and at suitable distances apart by means of flanges, A, or otherwise,"—cannot change the nature of the invention described. I do not understand that this language in the re-issue necessarily implies that the spur wheels are fastened to the wire, so as to prevent them from revolving, nor am I prepared to admit that, if this were the fact, it would change the essential character of the device.

The object of the Kelly patent was also to describe and claim a particular mode of constructing the barb, and attaching it to the wire of the fence. And the drawings of the original patent clearly indicate that this was done upon a single or a double wire. The patentee intended that these barbs should be stationary upon the wire. Nothing need be said of anything described or claimed in the patent except what refers to the wire and barb part of the fence. The peculiarity of the barbs of this fence is that they are cut in a diamond form from a plate, by machinery or otherwise, and each provided with a hole, so as to be strung on the wire at proper

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With this statement of the differences between the original and the re-issue, it cannot be said that there is anything claimed in the first three claims of the re-issue essentially different from those in the original. The fourth claim in the re-issue is not a claim in the original, but the two wires referred to in that claim as twisted together, with a series of thorns or barbs attached to one of the wires, are clearly set forth in the drawings of the original patent; and, if that constituted a part of his invention, and if it was not claimed through mistake or inadvertence, I know of no good reason why the claim in the re-issue should not be corrected by the drawings of the original patent. The words in the specifications of the re-issue that "it locks the thorn," are only a description of the effect produced by this mode of placing his peculiar barb on one of the wires twisted together.

Glidden, in his original patent, described the use of two wires coming together at various points, at which spurs are coiled around them, and which are spread apart between the coils so as to prevent the latter from moving longitudinally on the wires. Equidistant between the posts is a slotted tube containing a coiled spring, the object of which was to keep the wires at a proper tension as affected by heat or cold. This original patent was re-issued in divisions. Division A describes and claims a barb, consisting of a short wire pointed at both ends, coiled around and compressed about one or more strands of fence wire. The number of coils is not material. He says by this method he can put his barbs on wires already placed in the fence, or before they are there placed. The claim in this re-issue is—

In combination with a fence wire, a barb formed of a short piece of pointed wire, secured in place upon the fence wire by coiling between its ends, forming two projecting points, substantially as specified.

In the original he says:

I do not claim to have originated the devices known as spurs or prongs on the wires, they have been used before, and confine myself to the means for holding the spurs at proper intervals upon the wires, and to the means for obtaining uniform tension of the wires as claimed.

vs. Haish.

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confined to the special mode of constructing and attaching the barbs; and if a person who has invented and describes a particular form of barb, and a particular mode of attaching it to the wire, is entitled to a patent, we do not know why Glidden cannot be to this form of barb and mode of attachment, for the same reason that Kelly and Hunt were entitled to a patent. We cannot overlook what has been done, nor the immense number of patents that have been granted for peculiar modes of constructing barbs and attaching them to wire fences, and considering the success which has followed this barb of Glidden's—although it may be, as was stated in the former opinion, near the border line between mechanical skill and invention—yet we feel inclined to sustain it.

We have carefully examined the case cited, and decided at the present term by the Supreme Court of the United States —*Manufacturing Company vs. Ladd.*[1] The principle frequently decided by that court, that the re-issue must be for the same invention as that shown in the original, is emphasized with special force in that case; but we do not find that it lays down any new rule, and especially when comparing it with one decided at the same term—*Ball vs. Langles*, 102 United States, 128. In relation to the power of the Commissioner of Patents to determine whether there has been an accident, mistake, or inadvertence in the original patent, we are not disposed to change the rulings we have made upon the various claims and re-issues in this case.

We hold, therefore, as we construe the originals and re-issues, there is nothing contained in the claims of the re-issues which is not set forth in the specifications or drawings of the original patents. So far as there may be anything in the original opinion which may be construed to mean or imply that Hunt patented and had a valid claim to any and every form of barb upon a fence wire, this opinion is intended as a modification of the same.

Motion for a re-hearing denied.

[1] 102 United States, 406.

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. F. ALLEN.

RICT OF ILLINOIS—

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charges that defendant was the president of said bank on the second day of October, 1874, and that as such president he made certain false entries in regard to the condition of the bank in a report as to the condition of the bank on said day, called for by the Comptroller of the Currency; and the fourth count charges similar false statements or entries to have been made by defendant, as president of the bank, in a report of the condition of the bank, made to said Comptroller on the 31st day of December, 1874; all which said false entries were made with intent to injure and defraud the said banking association and the stockholders thereof, and to deceive the directors of said bank.

It is admitted that the Cook County National Bank was organized under the National Banking Law in the early part of 1872, and that in the spring of 1873, defendant became the owner of a majority of its stock, and became its president, and the active manager of its affairs, and that he continued as such president and manager until the failure of the bank on the 19th day of January, 1875.

The indictment is framed under section 5209, of the Revised Statutes of the United States, which reads as follows: "Every president, director, cashier, teller, clerk or agent of any association, who * * * makes any false entry in any book, report or statement of the association, with intent in either case to injure or defraud the association, or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of the association; and any person who with like intent aids or abets any officer, clerk or agent in any violation of this section, shall be deemed guilty," etc.

You will have noticed from the statute as I have read it to you, that the false entries named must have been made with intent to injure or defraud the bank or its stockholders or any company or individual person, so that an intent to injure the bank, its stockholders, or some other person

is the offense under the law. The law authorizes the Comptroller of the Currency to call not less than five times a year for a full report of the liabilities and assets of the bank on the close of business on any day named, and any false statement or entry in any such report made by an officer of the bank with intent to defraud, or to deceive the officers of the bank, or the Comptroller, is an offense under the law I have read to you.

The entries in these reports, which it is claimed were false, relate mainly to the amount of bills and notes discounted held by the bank at the times covered by the reports, and to the amount of cash on hand at those several times. The cash is divided in the report into several separate items—such as:

Amount of National Bank notes on hand.

Amount of treasury notes on hand.

Amount of gold and silver coin.

Amount of fractional currency.

Amount of funds in hands of reserve agents, etc., etc.

The first question to be considered is, Were the entries complained of in these various reports, or any of them, false; and were they made by defendant?

Secondly, Were said false entries made by defendant or did he aid and abet in their being made by Cleveland, *with intent to injure and defraud the bank or its stockholders or to deceive its directors?*

In regard to the first subject of inquiry, were the entries in the reports, or any of them, false, and were they made by defendant? The word "false" as used in this law, means willfully and intentionally false; a mistake in the amount of an item, growing out of accounts in book-keeping, would not make a man guilty under the law. The law intends to punish an intentional mis-statement in regard to the affairs of the bank. These reports must show the condition of the bank truthfully. The reports need not agree with the books, either in the statement of assets or the names by which they are called.

They may, for instance, call overdrafts loans, if they are in fact loans arranged for and understood as such. What I mean is, that differences between aggregate items in the report and the books may be explained—for you all understand that a bank could hardly be managed successfully unless its books in some form contained a full history of its business transactions. The Comptroller of the Currency prescribes the form of the report, and the kind of information it must contain, and if the books are not so kept as to show these items in this form, then the statement or report must conform to the truth of the affairs as they actually exist, giving the items of information called for by the Comptroller truthfully. The law, and the form of report prescribed, recognizes that in these banks there will be quite an amount which may be carried as cash, and known as "cash items" which will not be in fact cash. In some banks, as appears from the proof, "call loans" are carried as cash—the checks or memoranda evidencing such transactions are counted as cash merely because they represent cash, and are only intended to serve a temporary purpose. And so a bank officer, in making his report to the Comptroller, may distribute his overdraft account, and put such as actually represent loans to the class of loans and discounts. The report alone may not show whether the bank is solvent or not. The bank may, in good faith, have discounted paper and made loans, which by changes in business affairs, have become either worthless or greatly depreciated; and the paper representing such loans or discounts will represent so much money actually due the bank, yet it will not be available. In order, therefore, to determine whether the assets reported as held by the bank are actually good, a bank examiner is appointed, who, by actual inspection from time to time of these assets, and from such information as he can obtain in regard to the solvency of the makers of the paper on hand, decides whether the bank is in a sound condition or not.

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gations of the bank examiner, that the public and the Comptroller determine as to the credit of the bank. Therefore a bank officer called upon to make reports under the law, cannot avoid the responsibility, either civil or criminal, for statements in the report by showing that they were made by a clerk, and that if false he did not know it. The clerk must be presumed to have written the report under the direction of the officers who are required to verify and attest it, except as to actual mistakes shown.

The prosecution has offered proof tending to show that there were several false statements in reg rd to the assets of the bank in each of the reports referred to in the indictment. A part of the proof thus offered and admitted at the time, subject to objection, was the testimony of Mr. Meigs, who has been for several years bank examiner in the district which includes the city of New York, and was detailed by the Comptroller of the Currency to examine the books of this bank, in the month of March, 1877, the books and papers then being in the hands of the receiver; and he has given testimony as to the results of his examinations tending to show that the statements in the reports under consideration were false in most of the particulars charged, especially in regard to the amount of loans and discounts, and the amount of cash on hand. It cannot be expected that a jury would be able to examine for themselves a complicated set of books like those kept in banking institutions, and from their own examination arrive at any reliable conclusion in regard to the actual condition of the bank, and hence, a skilled accountant, who has had experience in book-keeping, and who has gone through such a set of books, may testify to the results of his investigations as shown by the books. But it appeared from cross-examination, and in reply to questions asked the witness by myself, that Mr. Meigs, conclusions, or results, to which he testified were not wholly obtained from the books and papers of the bank, but partly from the statements of persons, clerks and officers of the

bank, whom he interrogated—so that what he testified to was not solely the showing of the books, but partly the conclusions drawn by Mr. Meigs from information, which he chose to consider true, drawn from other sources. For this reason his testimony must be excluded, except such parts of it as appears to have been derived solely from an examination of the books—that portion and that alone you are at liberty to consider as before you.

The prosecution has also put in the testimony of several other witnesses, that of Mr. Barrett, the book-keeper of the bank, Mr. McQuiston, the teller, Mr. Cleveland, a clerk, and Mr. Burley, the receiver, who have all given testimony tending to show that the reports contained false statements as to the assets of the bank. This is wholly a question of fact, and to be determined by you in the light of the proof which has been submitted. The law makes you the judges as to the weight of the testimony, and the credibility of the witnesses. Much proof has been submitted to you as to the amount of "reserve" on hand, but this is only another name for cash. The law at the time these reports were made, required National Banks to keep on hand cash equal to twenty-five per cent. of their circulation and liabilities; that is, they must have this twenty-five per cent. of their liabilties ready to meet any demand upon them. The balance of their assets could be invested, and fifteen per cent. of the reserve of the bank might be in the hands of other National Banks approved by the Comptroller as "reserve agents." And the proof tends to show false statements in the reports, as to the amount of money belonging to this bank in the hands of its "reserve agents." This reserve may also be in the vaults of the bank; and the testimony of Mr. McQuiston tends to show that the top sum, or the amount in the right-hand column of his teller's book, represented the amount from day to day of cash claimed to be in the vault; and testimony has been given tending to show that the money called for by these figures was not in fact in the vault, or in the possession

of the bank. Proof has been offered by the defendant tending to show that the full amount of money called for by the teller's book was in fact on hand up to the last week the bank did business, and was finally exhausted in the payment of protested bills of the bank which had been dishonored by the firm of Allen Stephens & Co., the bank's principal New York correspondent.

The Government's proof also tends to show large discrepancies between the amount of loans and discounts as shown by the books, and the statements in the report; and this is met by defendant with proof tending to show that large overdrafts were permitted, at or about the time these reports were made, which the bank had a right to treat and report as loans.

From all this proof you are to say whether the allegations in the indictment in regard to false statements in these reports, or any of them, are satisfactorily established by the testimony. If you are satisfied as to the falsity of the statements of the reports or either of them, the next matter to be considered is, Were these false statements made with intent to injure or defraud the bank, or its shareholders, or to deceive the directors?

The intent to defraud or deceive is the essence of the offense and must not only be proven, but must be proven as laid in the indictment. It must appear that the false entries complained of were made with intent to defraud the bank or its shareholders, or to deceive its directors; an intent to deceive other persons, creditors or depositors of the bank, or to deceive the Comptroller, or the public in regard to the standing of the bank, will not sustain the charge you are sworn to try. So that the proof must satisfy you not only that the entries complained of were false, but that they were made with the specific intent alleged.

In determining the question of the defendant's intent, you should take into consideration the relation the defendant bore to this bank, both as an officer and shareholder; and

also the testimony in the case tending to show that defendant, besides the money which he put into the stock of the bank at the time he purchased it, also used a large portion of his private fortune in efforts to sustain it. And it is for you to say, in the light of this proof, whether the defendant by the false statements in the reports, if you find them false, intended to defraud the bank or its stockholders, or to deceive its directors; or whether such statements were made to defraud the depositors, or other creditors of the bank, and deceive the Comptroller and the public who dealt with it. If the proof does not satisfy you that the intent was to defraud the bank, or its shareholders, or to deceive the directors, then the Government's case is not made out. In this connection you may properly inquire, in the light of the proof, whether defendant had any motive to defraud the bank. Was he asking credit of the bank at this time, or seeking to obtain any of its property, or could he have been benefited by false reports of its credits except as a stockholder, or had he any motive for deceiving the directors? Were any of the directors making inquiries or investigations into the affairs of the bank, and did defendant deem it necessary, for any purpose of his own, to stop such investigation, or quiet any suspicion on the part of his directors? If you find from the proof that such motives existed, they might go far towards satisfying you that the guilty intent existed; but if on the contrary you find from the proof that there was no such motive or object on the part of defendant, it should weigh upon the other side of the scale and at least tend to show there was no such intent as is charged.

And finally, gentlemen, the prosecution is bound to make out the offense as charged, both as to the falsity of the entries and the intent with which they are made, beyond a reasonable doubt; and if the proof leaves a reasonable doubt upon your mind either as to the falsity of the entry or as to the defendant's fraudulent or criminal intent in making them,

he is entitled to a verdict of acquittal at your hands. In this connection it is proper that I call your attention to the proof introduced as to the former good reputation of the defendant for integrity and upright dealing. If the testimony, especially upon the question of guilty intent, leaves it doubtful whether the defendant intended to commit the offense charged, then evidence of good reputation may be allowed to resolve that doubt, in favor of the defendant. If the criminal intent charged is so satisfactorily shown as to leave no doubt, then evidence of good character should not be allowed to overcome such proof; but if the testimony upon that point fairly leaves the question of criminal intent in doubt, then the evidence of good character may properly be allowed to settle that doubt in defendant's favor.

If, then, you are satisfied beyond reasonable doubt of defendant's guilt as charged then you should find him guilty. But if on the contrary you find that either the falsity of the entries, or criminal intent as charged, is not proven beyond a reasonable doubt, then your verdict should be, not guilty.

Verdict—Not guilty.

ABRAHAM ROBINSON vs. LOUIS P. SUTTER.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—DECEMBER, 1880.

IN EQUITY.

1. PATENTS—LANGUAGE OF CLAIMS—HOW CONSTRUED.—The language used in a patentee's claim is to be construed in the light of his specifications and the obvious design of the patent.

2. TOBACCO RE-SWEATING APPARATUS—INFRINGEMENT.—A patented apparatus for re-sweating tobacco, consisting of three parts, one of which was a wooden tobacco holder—described as a tight vessel—in which the tobacco was placed and suspended in steam for the purpose of being heated, and moistened by percolation through the wooden vessel: *Held* to be infringed by a device operating upon the same principle but the tobacco holder of which was not a "tight" vessel.

3. NOVELTY OF DEVICE.—The wooden tobacco holder, the tobacco in which is moistened by percolation: *Held* not to be anticipated by a metal holder into which the steam is directly admitted.

Munday, Evarts & Adcock, for complainant.

Banning & Banning, and *Adolph Moses*, for defendant.

BLODGETT, J.—This is a suit for infringement of letters patent granted by the United States to complainant, Abraham Robinson, on the 10th of June, 1879, for an improved apparatus for re-sweating tobacco.

The defense set up is: First. That defendant does not infringe complainant's patent. Second. That complainant's patent is void for want of novelty.

It seems from the proof, that in the manipulation of tobacco it is deemed very desirable to obtain a dark uniform color in the leaf, especially of that to be used for cigar wrappers; that in the natural sweating which the leaf undergoes in the

ordinary process of curing, it is left spotted, or some leaves will be darker than others, and the process of re-sweating is intended to bring the tobacco to a dark and uniform color.

Robinson claims to have discovered that tobacco can be successfully re-sweated by packing the leaves closely in a mass in a wooden box or tub made substantially tight, except so far as the pores of the wood will admit vapor or moisture to slowly percolate through the wood and diffuse itself with the mass of leaf, from a body of warm water and expanded steam contained in an outer tank or chamber surrounding the tobacco holder; the process to continue from three to eight days according to the mass of tobacco to be operated upon. The apparatus which he devised for this purpose, and which is covered by his patent, consists:

First. Of a tank, or chamber, adapted to hold a body of water, and sufficiently tight to hold expanded steam, or steam generated in or let into the chamber at a very low pressure.

The model presented here consists of a tank which is water-tight at the bottom, and substantially water or steam-tight above, with the tobacco holder let into it, and suspended by a rim upon the edge, the holder being made tight as described; but the patentee does not restrict himself to this precise form of construction.

Second. A tobacco holder in which the mass of leaf tobacco is placed, which tobacco holder is placed or suspended inside of the tank or chamber.

Third. A steam generator for producing steam, by which the water in the chamber is to be warmed, and steam generated, whereby a warm, humid atmosphere is kept constantly about the tobacco holder, and the warm moisture gradually diffused through the tobacco in the holder.

The size and capacity of the apparatus is wholly within the control of the operator. It is obvious that the water tank, or chamber, must be, for practical purposes, large enough to contain the tobacco holder, and give a space underneath the holder for water, and a space above the water and

around the holder for steam to diffuse itself, so as to wrap the tobacco holder in the wet steam or moisture; that is to say, the tank must be large enough to contain the tobacco holder, giving a water space underneath, and space about the tobacco holder, around which steam can circulate. The tobacco holder is made comparatively tight, so as to prevent the steam from coming in direct contact with the tobacco, but enough moisture is found to be admitted through the pores of the wood, in connection with the warmth, to secure the process of re-sweating. The heater, or steam generator, is placed outside the chamber, and its only function is to supply the necessary heat, which may be done by passing steam into the water only, or steam may be let into the chamber above the water if desired.

The device used by the defendant operates upon precisely the same principle as that of complainant; that is, it has a tank or chamber within which the tobacco holder is placed. The bottom of the tank is supplied with water, which is heated by an outside steam generator or heater, and the only difference between the two devices of the complainant and defendant is, that the defendant's tobacco holder is not made tight so as to exclude moisture except through the pores of the wood, the defendant in practice using the ordinary tobacco cases in which the leaf tobacco comes packed, to hold the tobacco during its process of re-sweating. In other words the defendant opens the doors in his tank, and slides the ordinary tobacco case, full of tobacco, into the steam box, and allows it to remain there until the tobacco has become re-sweated, which is in no respect different from the process of Robinson, except as hereafter noted. But it is claimed that this is a substantial difference, because it is insisted that complainant's claim requires his tobacco holder to be tight, while the defendant's tobacco holders are not tight.

I think, however, that the word "tight," as used in his claim is to be construed in the light of his specifications, as meaning sufficiently tight to subserve the purposes to be accom-

plished. The term, as used here, must be held, I think, to mean comparatively or approximately tight; close enough to exclude an excess of steam or moisture, and open or porous enough to allow the warm moisture to sweat or percolate into the tobacco holder, so as to warm and moisten its contents; and it would seem that slight crevices or openings arising from defective mechanical construction, if not large enough to admit steam in such quantity or volume as to wet the tobacco, would not violate this patentee's rule of construction.

The patentee, as I have already said, describes in his specifications the kind of tank he requires for his process. He says: "It is usual to soften the leaves of tobacco, as is well known, in order to prepare them for being manufactured into cigars and other manufactured goods, and to bring out a good and uniform color. This has been done heretofore in various ways, and, among others, by dampening the leaves and exposing them to heat while in that condition."

"The object of this invention is to provide improved means for exposing the leaves to the action of steam for the purpose above set forth; and to that end my invention consists of a tobacco holding vessel, made of wood, sufficiently porous to permit the steam to percolate through it in combination, substantially, as hereinafter described, with a steam generating apparatus, and a steam receiving chamber surrounding the vessel for containing the tobacco."

"I am aware that the general structural plan of the apparatus hereinafter described is old, and I do not therefore, here intend to claim the same independently of a tobacco receiving vessel made of wood sufficiently porous to permit the steam to percolate through it, as and for the purposes set forth, the said wooden vessel constituting, as I believe, an improvement upon the apparatus heretofore in use, for the reason, that, in employing wood instead of metal, in the construction of the said vessel, the tobacco is prevented from being tainted, and may be kept continually moist by

the action of the steam, instead of being merely heated and sweated by it, or steamed only by the generation of steam in the same vessel containing the tobacco, it being obvious that, if the tobacco receiving vessel be made of metal, as heretofore in devices of this class the steam in the outer surrounding vessel would merely heat the tobacco and sweat it without imparting new moisture to it. Neither do I here intend to claim the process, as such, of steaming tobacco." * * * * * *

"C is a tight wooden vessel for receiving the tobacco to be treated. This vessel should be provided with a tight fitting cover *a*. I make the vessel C of wood, as an essential feature of my invention, in order that the steam may sweat or percolate through it from the tank B, and so that the tobacco will not be tainted by contact with metal. The vessel C is enough smaller than the tank B to be suspended in the latter, and leave an annular space, *b*, between the two, as well as a space underneath the bottom of the vessel C as shown."

It is obvious that this inventor meant to have the tobacco holder, as he calls the box C, sufficiently open, either through the pores of the wood, or interstices between the staves or boards, so that steam would slowly percolate through, and not that a strong jet of steam should pass through any one crevice or opening, so as to be condensed on the tobacco and wet it, but that it should slowly percolate through the pores of the wood, and maintain a steady low degree of warmth inside the holder, and upon the leaves. This was the evident purpose of the inventor in the device which he has presented. It is true the inventor in his claim, says: "I claim, First. The apparatus substantially as described for treating tobacco, to-wit: the tight vessel or tank B, *the tight vessel C, made of wood,* and suspended in the tank B, and a steam generator or heater, all combined and operated together, substantially as and for the purposes specified. Second. The combination of the boiler A, the

tight tank B, made of wood, *the tight vessel C, made of wood*, and suspended in the tank B, and the pipes D and E entering the tank B, and the boiler, all arranged and operating substantially as and for the purposes specified."

The "tight vessel C" as described and referred to in the claims must mean the "tight vessel C," described in the specifications, and no other; and that means simply one comparatively or approximately tight—one tight enough to exclude a large jet of steam, and at the same time open enough to admit the percolation of steam through it.

It is obvious that what this inventor wished to accomplish was to moisten his tobacco without wetting it. Now, literally, a thing which is moist may be said to be wet; but there is, after all a practical difference between wet tobacco and moist tobacco, which is of great consequence in the manufacture of this commodity, and to the success of this process, and complainant intended by his mechanism to obtain by means of his porous tobacco holder just that degree of warmth and moisture which would cause the re-sweating of the leaves so as to secure an equal distribution of the coloring matter, and perhaps of the essential oil of the tobacco through the whole contents of the mass subjected to the process, so as to make it nearly homogeneous in color and quality.

If, therefore, it was the intention of the complainant, and a necessary part of his device, that the tobacco holder should be open or porous enough to admit moisture, I do not think defendant can be allowed to infringe by using a tobacco holder a little more porous or open.

The essential feature of complainant's invention consists in subjecting the mass of leaf tobacco to moisture and heat in a comparatively close wooden box for a sufficient time to have it undergo the process of re-sweating; and it is no answer to complainant's charge of infringement of his patent, to say that defendant's box is not quite so tight as that

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JAMES STINSON vs. GEORGE S. PEPPER *et al.*

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—DECEMBER, 1880.

IN EQUITY.

1. REDEMPTION FROM SALE UNDER POWER IN TRUST DEED.—Under a clause in a trust deed, the entire debt was declared due, for non-payment of an installment of interest, and the property sold, by the trustee, after publication notice, for less than one-third its value, and for a smaller amount than the mortgage debt, it being bid in by the holder of the note, who prior to the sale had given the mortgagor to understand that when sold the property would be held merely as a security for the balance of the debt, and that he would have the right to make disposition of the property, using the proceeds to satisfy the balance due. After the sale the holder refused to carry out this arrangement. *Held*, that the mortgagor was entitled to redeem, on paying the full amount of the indebtedness, interest and taxes.

2. A SALE EN MASSE,—when the property lies in two separate tracts both of which have been subdivided into lots, is irregular.

Bill to redeem certain real estate from a sale made under the power contained in a certain trust deed given by complainant to Charles Hitchcock, trustee.

Dent & Black, for complainant.

Mattocks & Mason, for defendants.

BLODGETT, J.—The facts of the case as they appear in the record, are: That on the 10th day of November, 1875, defendant Pepper loaned to complainant Stinson the sum of $16,000, for which Stinson gave his bond in the penal sum of $32,000, dated November 10, 1875, conditioned that if Stinson should pay, or cause to be paid, to said Pepper the sum of $16,000, on the 10th day of November, 1880,

with interest from date, at the rate of nine per cent. per annum, payable semi-annually, on the 16th day of each May and November, in each year, until the whole principal sum should be paid, then the bond should be void, otherwise to remain in full force; with a provision that if default should be made in the payment of any interest, and any portion thereof should remain unpaid for the space of 20 days after the same became due and payable, then the principal sum, with all arrearages of interest, should, at the option of Pepper, become due and collectible at any time after such default, without notice. Coupons were also attached to said bond for the semi-annual installments of interest. To secure the payment of said bond, and the interest therein provided for, Stinson made and delivered to Charles Hitchcock, as trustee, his deed of trust conveying the premises in question, with power to the trustee, if default should be made in payment of said principal sum, or any interest that should accrue thereon, when the same became due and payable, or if Stinson should suffer the premises, or any part thereof, to be sold for any taxes or assessment whatever, to sell and dispose of said premises at auction, after publication of notice as required by the terms of said trust deed, and that out of the funds of said sale, said trustee should pay:

First. The expenses of said sale, and all moneys advanced for insurance, taxes, and redemptions from tax sales.

Second. All of the principal and accrued interest thereon, due on said bond.

Said trust deed also contained the usual covenants of title and against incumbrances. In order further to secure payment of said loan, Stinson executed with the said bond, a letter of attorney, authorizing Charles Hitchcock, or any attorney of a court of record, to confess a judgment in any court of record for the amount due on said bond, in case of default in the payment thereof, or any interest thereon.

Default was made by Stinson in the payment of the interest which fell due on the 10th day of May, 1878, which default continued more than 20 days, and Pepper declared the whole sum secured by said bond and trust deed to be due and payable, and on the fourth day of October, 1878, the trustee, at the request of Pepper, sold the premises conveyed by the trust deed at public auction, after having given notice of the time and place of such sale as required by said trust deed, the creditor Pepper being the purchaser for the sum of $8,500, which, after deducting the cost of said sale, left the sum of $8,261.03 to apply on the said indebtedness secured by said bond.

On the 16th day of September, 1878, after the alleged default in the payment of the May interest, and after the trustee had by the request of Pepper proceeded to advertise the property to be sold under the provision of the trust deed, Pepper caused judgment by confession to be entered in the Superior Court of Cook county in his favor for the sum of $17,272, being the amount then due for principal and interest on said bond, and costs, including $60 attorney's fees for the entry of the judgment; and since the sale under the trust deed, the balance of said judgment, after applying the proceeds of said property, has been paid.

It further appears that the sale made by the trustee was of the entire property conveyed by the trust deed, *en masse*, although it was platted and subdivided into lots, and lay in two separate tracts or parcels of lots, fronting on different streets.

It also appears that at the time of the sale under the trust deed, negotiations were pending between Stinson and Pepper for a settlement of the matter; and that Pepper had held out and insisted to Stinson, both at a personal interview and by his attorneys in that behalf, that he did not want said real estate. A few days before the sale, a stipulation in writing

between the parties was prepared, providing for the adjustment of the indebtedness, and the terms on which Pepper should allow Stinson to sell the property, to apply the proceeds of the sale to payment of the debt after the trustee's sale had taken place. This paper was prepared after full consultation between the attorneys of Pepper, and the attorney of Stinson, and although it was understood that it was to be sent to Pepper for his approval and signature, there can be no doubt from the proofs that Stinson and his attorney fully and in good faith expected that Pepper would approve and sign the stipulation so prepared; that the title after the then pending sale would be only held by Pepper as security for the indebtedness; and that Stinson would be allowed, on some just and equitable terms, to negotiate sales of the land, and to apply the proceeds to the extinguishment of his debt; this belief having been based mainly upon the protestations and assertions by Pepper that he did not want the land, and the assurances given by Mr. Mason, the attorney of Pepper, to Mr. Dunlevy, the attorney of Stinson, that Pepper was ready and willing to make an equitable arrangement for the redemption of the land by Stinson.

The proof also shows, quite satisfactorily, that at the time of the trustee's sale, the property in question was fairly worth at least $30,000, and it also appears that before the making of the trust deed the premises had been sold at tax sale, and that at the time of sale the redemption would expire within a month.

Relief is claimed upon several grounds:

First. That the sale was void because made *en masse* when the property was susceptible of division; and for a greatly inadequate price.

Second. That Stinson was led to believe from negotiations with Pepper and his attorney, that he was to be allowed to

redeem the property, or apply its proceeds in payment of the indebtedness after sale.

Third. That the conduct of Pepper has been harsh and oppressive toward Stinson to such a degree as to justify the interference of a court of equity in his behalf.

It will be noticed that this bill is not, like many cases where a mortgagor seeks to redeem, filed long after the sale, and after a decided rise in the selling value of the property has made it an object for him to do so; but this suit was brought so promptly after the sale that no material change in the value of the property had taken place.

It may further be observed that the terms of the contract between the parties in this case, while not unusual of late years in this locality between lenders and borrowers of money, are at the same time so stringent, and place the borrowers so emphatically at the mercy of the lender in any case of accidental or unavoidable breach or default, as to make the conduct of the parties acting under this extraordinary power a special matter for the surveillance of a court of equity.

There may have been, and probably was, a technical default on the part of Stinson in the payment of his May coupon such as by the letter of the contract allowed Mr. Pepper to declare the whole debt due, and require the trustee to sell. But it is very evident to me from the proof that the complainant did not suppose even after the forfeiture was declared and the property advertised for sale, that it was the intention of Pepper to make an absolute sale of the property, and deny Stinson the right to redeem by the payment of the indebtedness. The protestations of Mr. Pepper that he did not want the land, that all he wanted was his money, were certainly fairly subject to the interpretations that he would gladly give up the land if his debt was paid; and when the sale took place, Stinson was, I have no doubt, fully impressed with the belief that the draft of the contract which had been

prepared after the consultation between the attorneys of the parties, giving him a right to redeem, or, what was equivalent thereto, to negotiate a sale of the land and have the proceeds applied to the payment of his indebtedness, if done within two years, would be approved and signed by Pepper; and it was only after the sale had been consummated, that the intimation was given Stinson that there was any doubt of Pepper's approval of the proposed terms of adjustment. The day after the sale, Mr. Mason, Mr. Pepper's attorney, wrote Judge Dunlevy, the attorney of Stinson, what had not before been intimated, that it was doubtful whether his client would make any arrangement for a settlement; but suggesting that Stinson make a proposal for settlement much more stringent in its terms than any which had before been talked of or expected by Stinson. Stinson was at this time pecuniarily embarrassed, and unable to accept the new terms suggested. I do not think there is anything in this case tending to show that Mr. Mason, the attorney for Pepper in the matter, was guilty of any bad faith or deception towards Stinson or his attorney. It is very clear that Mr. Mason meant Judge Dunlevy to understand that the terms of any arrangement for the redemption of the property must be submitted to Mr. Pepper, and approved by him. Mr. Mason undoubtedly understood that his client wanted more security for his debt, and his letters, which are in evidence, only show that he suggested the offer of further security as the only probable condition upon which an adjustment could be obtained, a suggestion which had not been made during the negotiations pending the sale.

I have no doubt, therefore, that when this sale was made, Stinson expected, and had been led by what Pepper had said to him to expect, that a right to redeem by the payment of the mortgage debt, interest and costs, would not only be recognized by Mr. Pepper, but that he would be glad to

have the property redeemed; and the fact that Mr. Pepper wanted more security, which Stinson was unable or unwilling to give at that time, ought not, it seems to me, to affect the question in this case. If the security had been doubled or quadrupled, Mr. Pepper could only have got the payment of his debt out of it; and this court, if it allows a redemption, will certainly see that the indebtedness is fully paid before a redemption is consummated.

It is alleged in the bill that the mortgaged property was sold *en masse;* and this allegation is not denied in the answer and must be taken as proved. The proof shows that the property was capable of division. It had been subdivided into ten separate lots, each distinguished by a different number and description in a recorded plat. The lots from 5 to 9 inclusive adjoined each other, and made, together, a tract fronting on one of the South Park boulevards about 250 feet. The other lots, 21 to 25 inclusive, fronted on another avenue of the South Park about the same number of feet; and the two parcels or group of lots did not adjoin or touch each other, so that there were certainly two separate tracts. No one attended the sale, save the trustee and the agent and attorney of Mr. Pepper, owing to the fact that Stinson understood from what had occurred in the negotiations, that the sale would not foreclose his right to the application of the property at its full fair selling value to the payment of his debt, and he did not, therefore, attend the sale, or take measures to obtain the attendance of bidders.

As I have already said, the sale was for a price which the proof shows was far below the fair cash value of the property. It was irregular by reason of the property being offered and sold in bulk, instead of separate parcels; and Stinson in good faith believed that he was to be allowed to redeem the property.

When he found the sale was to be treated as absolute, his

right to redeem denied, and the collection of the unpaid balance enforced by vigorous legal proceedings, both here and in Canada, where Stinson seems to have been temporarily residing, he at once filed his bill attacking the sale.

The loan has but just matured by its terms. The bond fell due on the 10th of November, 1880; and it seems to me that under all the special circumstances surrounding this case, it can be no hardship to Mr. Pepper to allow a redemption of this property on equitable terms—it certainly seems to me that it would be inequitable to allow Mr. Pepper to retain this valuable property for the paltry sum of $8,261—after he has collected the balance of his debt out of Stinson's other property—when he can be fully made whole for his money loaned, and disbursements in regard to it, and all substantially within the time which the original loan was to run.

It appears from the pleadings and proof that the property in question had been sold for taxes and South Park assessments before the trust deed to secure Mr. Pepper's loan was given, and that the redemption would expire within about a month after the sale took place, the amount required to redeem being about $4,000. I have no doubt that this breach of his contract on the part of Stinson provoked and annoyed Mr. Pepper exceedingly, because it not only put the title of the whole property in jeopardy, but it also required Pepper to advance a large sum of money in order to protect it; and I have no doubt that this act of negligence, to call it by no severer term, has been the chief cause of the difficulty between the parties. It is likely that if Mr. Stinson had redeemed the property so as to fully clear up and protect the title, the default in payment of interest could have been readily condoned, but the parties got at variance, and finally went before the court to have their equities settled.

On the reference to the master, it was stipulated that the

inquiry before him should be solely on the question as to complainant's right to redeem; and proof was only taken on that point. The master found against the complainant, to which he excepted. This exception for the reasons given, I shall sustain; but shall re-commit the case to the master, with instructions to take proof and report on what terms complainant shall be allowed to redeem.

1st. He will ascertain and report the amount yet due and unpaid to defendant Pepper on the indebtedness secured by the bond and trust deed, with interest thereon according to the terms of the contract.

2d. The amount Mr. Pepper has paid for taxes and assessments on said property; the time of such payment, and the interest which should be allowed thereon.

3d. The amount paid by Mr. Pepper to redeem or purchase the premises from any and all tax sales.

A decree may be drawn finding that the complainant is entitled to redeem the property.

HIRAM G. DANIELS vs. THE CITIZENS' INSURANCE CO.

CIRCUIT COURT—DISTRICT OF INDIANA—JANUARY, 1881.

1. INSURANCE—EVIDENCE—RIGHT OF ACTION—OPEN POLICY.—Where in order to evade the laws of Ohio, an insurance company issued an open policy to its general agents to cover all risks indorsed thereon or certified to be covered thereby, and its local agents in Ohio placed insurance which was covered by said policy, but which ran in their own names, it was *held*, that the party actually insured could show by parol that the insurance was taken out for his benefit, and could maintain an action in his own name against the insurance company for the amount of insurance, in case of loss.

2. UNDERWRITERS ARE HELD TO THE UTMOST GOOD FAITH in making out policies for those who deal with them.

3. PAROL CONTRACTS OF INSURANCE are valid unless prohibited by statute.

T. D. Lincoln, for plaintiff.

Asa Iglehart, for defendant.

GRESHAM, J.—The complaint alleges that the Citizens' Insurance Company is a corporation organized under the laws of Indiana, located at Evansville, and doing a general marine insurance business; that on the eighteenth day of December, 1878, the plaintiff was the owner of 2,500 bushels of salt, of the value of $2,500, then in a seaworthy barge in the Ohio river, at Middleport, Ohio, in tow of the steamer Robin, and bound from Middleport to Memphis, Tennessee; that Hudson & Bro., citizens of Middleport, were agents of the Citizens' Insurance Company at that place in soliciting business; that it was the practice of the insurance company and its agents, Hudson & Bro., to give to persons who insured their prop-

erty with said agents slips certifying that Hudson & Bro. were insured in the property therein described, under an open policy numbered 38, which the insurance company had previously issued to Drew & Bennett, its own managing agents at Evansville; that on the eighteenth of December, 1878, Hudson & Bro., in consideration of $45 paid to them by the plaintiff, agreed to insure him against the perils of the river in the sum of $2,500 on his cargo of salt, the loss, if any, to be payable 60 days after proof; that by the laws of Ohio no foreign insurance company was allowed to do business in that state without complying with certain enumerated conditions and obtaining from the commissioner of insurance a license; that the Citizens' Insurance Company adopted this mode of doing business, through its agents in Ohio, under the open policy numbered 38, and issuing certificates certifying that its own agents in Ohio were insured under said open policy, to avoid the provisions of the Ohio statute prescribing terms upon which foreign insurance companies might do business in that state; that in putting the insurance in this form it was intended by the insurance company to insure Hudson & Bro., on account of the plaintiff, in the sum of $2,500 on his cargo of salt; that the salt had been shipped by the plaintiff to John K. Speed & Co., of Memphis, who were expected to make advances thereon and pay charges therefor, for which reasons John K. Speed, one of the firm, was made appointee in the slip or insurance certificate, to receive the insurance in case of loss, for the plaintiff; that on the nineteenth of December the barge was grounded while in tow of the steamer Robin, and the salt became a total loss by the perils insured against, and that the proof was made of the loss and the plaintiff's interests therein.

The defendant demurred to the complaint, and it is insisted, in support of the demurrer, that the intention of the parties must be found in the open policy and the slip certifying that

Hudson & Bro. were insured, and not the plaintiff; that there is nothing in either the open policy or slip indicating that Hudson & Bro. were insured as agents, or in any trust capacity, for the plaintiff or any one else; and that, being unambiguous, parol evidence cannot be received to alter or modify the instruments sued on.

Admitting the facts in the complaint to be true, as the demurrer does, the insurance company issued an open policy to its own agents at Evansville to cover all risks in Ohio indorsed thereon or certified to be covered thereby. Agents were then employed in Ohio to solicit and transact business in that state, but, to evade the laws of that state, the insurance obtained by these agents was made to run in their own names: the intention, however, being to insure, not the property of the agents, but the property of others. Hudson & Bro., of Middleport, Ohio, were agents to represent the insurance company at that place. They received the premium from the plaintiff, and made out and delivered to him a slip certifying that they, the agents, were insured under the open policy. The insurance company knew that the plaintiff, and not Hudson & Bro., were the owners of the salt, and that the barge upon which it was laden was seaworthy, and in tow of the steamer Robin, bound for Memphis. In short, the insurance company knew everything that was material to the risk, and that it was the purpose by this arrangement to insure the property, not of Hudson & Bro., but of the plaintiff.

After adopting this unusual, not to say questionable, mode of doing business to evade the laws of Ohio, the contract should be enforced according to the real intention of the parties. Having taken the plaintiff's money, and induced him to believe that he was insured, the insurance company will not be allowed to say that the contract is void because the efforts to make it conform to the rules of law was a fail-

ure. The insurance company is bound by the acts of Hudson & Bro. What the agent knew, the principal must be held to have known. The plaintiff paid his premium to the insurance company, and for its own purpose it put the insurance in the name of its own agents, and delivered the written instrument to the plaintiff as evidence that he was insured. Effect should be given to the plain intention of the parties by allowing the plaintiff to prove by parol that the insurance was put in the name of Hudson & Bro. for his benefit. Courts take notice of the well-known method of doing insurance business. Underwriters are trusted to make their policies express the intentions of the parties. Few stop to read and study their policies before accepting them and paying their premiums. Knowing that they are thus trusted, underwriters must act in the utmost good faith with those who deal with them. In applying insurance contracts to the proper subject-matter and the party or parties intended to be covered by the risk, courts have been liberal in receiving parol testimony in favor of the assured. It is well settled that when a written contract is made by an agent, in his own name, the undisclosed principal may sue upon it and prove by parol evidence that the contract was made for his benefit; and this may be done although the other party had no knowledge of the agency and supposed that he was dealing with one who was acting for himself. *Huntington vs. Knox*, 7 Cushing 371; Story on Agency, § 61.

In *Insurance Co. vs. Chase*, 5 Wallace, 509, William Chase, J. W. Mungen, and three others were trustees of a church, and held the legal title to it in trust for the society; Mungen was also agent of the Howard Insurance Company. As such agent he took a fire risk of $5,000 for his company on the church property, in favor of William Chase, who paid the premium out of his own private means on account of the parish, with the assent of his co-trustees. The society was

indebted to William Chase, and the policy was made payable, in case of loss, to G. M. Chase. The church was destroyed by fire, the insurance company refused to pay the loss, and G. M. Chase, the payee in the policy, brought suit. The declaration averred that William Chase, being the owner in trust for the Union Congregational church for a premium paid in money, effected the insurance. The court held that the action could be maintained for the full amount of the policy, although William Chase was but one of five trustees.

In the case of *Shawmut Sugar Refining Co. vs. Hampden Ins. Co.*, 12 Gray, 540, the policy was to P. E. Kingman and others of Boston, on their sugars, payable in case of loss to the Shawmut Sugar Refining Company. The property belonged to a corporation in which P. E. Kingman and others were stockholders. Their only interest in the company was as stockholders. There was no reformation of the policy, and the plaintiff recovered, notwithstanding the familiar rule that parol evidence cannot be received to contradict, vary or explain a written contract. If a policy runs to A. B. for whom it may concern, or A. B. as agent or in some trust capacity, an action at law may be brought, in case of loss, in the name of A. B., disclosing the name of the real party in interest, or by the real owner of the property. *Rider vs. The Ocean Ins. Co.*, 20 Pickering, 259.

That being the case, if a written contract made in the name of one person, not an agent, but really for the benefit of another, from whom the consideration moves, as in this case, there is no good reason why the latter may not sue on it in his own name and prove by parol evidence that the contract was made for his benefit. In support of the plaintiff's right to maintain the action in his own name, see, also, *Archangel vs. Thompson*, 2 Campbell, 620; *Thompson vs Railroad Co.*, 6 Wallace, 134; *Protection Insurance Co.*

vs. Wilson, 6 Ohio State, 553; *Anson vs. Winnesheik Ins. Co.*, 23 Iowa, 85.

If the written contract should be held void for the reason that Hudson & Bro., while acting for the insurance company, could not insure themselves, the defendant is equally unfortunate, for then we have a parol contract of insurance. As we have already seen, all the facts material to the risk were known to the insurance company, and it agreed to insure the plaintiff on his cargo of salt for $45. The premium was paid, and the agreement was complete in all its parts before any effort was made to reduce it to writing.

It is now well settled that contracts of insurance may be made by parol unless prohibited by statute. *Relief Ins. Co. vs. Eggleston*, 96 United States, 572; *Sanborn vs. Fireman's Ins. Co.*, 16 Gray, 448.

The demurrer is overruled.

THE CHICAGO & WESTERN INDIANA RAILROAD CO. vs. THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY CO. *et al.*

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—JANUARY, 1881.

IN EQUITY.

1. REMOVAL OF CAUSES—CITIZENSHIP OF CONSOLIDATED CORPORATIONS.—When a corporation created by the laws of one state, becomes consolidated with corporations of other states, and changes its name, and is sued by the new name in a court of the state of its creation, by a corporation of the same state, another one of the consolidated corporations, created by another state, cannot go into the state court and have the cause removed to the Federal Court.

2. CONSOLIDATION OF CORPORATIONS.—The result of the consolidation of the various corporations is, that as to any one state, the corporation of that state is the sole representative of the other corporations.

Lawrence, Campbell & Lawrence, for complainant.

Jas. L. High, Geo. W. Kretzinger, and *C. D. Roys*, for defendants.

DRUMMOND, J.—Under the general law of the state of Illinois, of November 5th, 1849, a corporation was created called the Northern Indiana and Chicago Railroad Company, to which were given the general powers of a railroad company by the Act of June 16th, 1852. That company, under the authority of the laws of Illinois and Indiana, was consolidated with a railroad company of the latter state. A consolidation then took place between this consolidated corporation and a railroad company created by the laws of the state of Michigan; and afterwards there was a consolidation

between railroad companies created under the laws of Illinois, Indiana, Michigan, Ohio, Pennsylvania and New York, the result of which was that a consolidated railroad company was created, called the Lake Shore & Michigan Southern Railway Company, which owns and operates a line of railroad from Buffalo, in the state of New York, to Chicago, in the state of Illinois.

The property in controversy, being certain real estate in the county of Cook, was conveyed to one of the consolidated corporations created between the date of the original corporation, of the state of Illinois, and the consolidated corporation which was the result of the legislation of the different states. On September 13th, 1880, the Chicago & Western Indiana Railroad Company, a corporation of the State of Illinois, filed its original bill in the Superior Court of Cook County against the Lake Shore & Michigan Southern Railway Company. On November 22, 1880, the Lake Shore & Michigan Southern Railway Company, filed its cross-bill, alleging that it was a consolidated corporation composed of different corporations, organized and chartered under the laws of the states of New York, Ohio, Indiana and Michigan. On Nov. 27th, 1880, the Chicago & Western Indiana Railroad Company filed its answer to the cross-bill, denying that the Lake Shore & Michigan Southern Railway Company was a consolidated corporation as alleged in the cross-bill, but averring that it was a corporation of the state of Illinois, and that it was originally incorporated under the general incorporation law of 1849, and that subsequently it was consolidated with the other corporations heretofore mentioned. On the 29th of November, 1880, the Lake Shore & Michigan Southern Railway Company, filed its petition and bond, and affidavit of local prejudice, in the Superior Court, alleging that the complainant was a citizen of the state of Illinois, and that the petitioner was a citizen of the state of New York, and ask-

ing for the removal of the cause to this court. On the same day the Chicago & Western Indiana Railroad Company filed an answer to said petition, averring that the original bill was filed against the Lake Shore & Michigan Southern Railway Company, as a corporation of the State of Illinois only. The petitioner alleged the necessary amount required by the statute as the subject of controversy, and executed the proper bond. The State Court refused to grant the prayer for removal, and a transcript has been taken of the record of the State Court and leave is asked to file it, and have the cause docketed in this court, on the ground that it is a case properly removable under the Acts of Congress.

On the face of the petition the case is removable, but under the 5th section of the act of 1875, it has been submitted to the court upon the facts as heretofore stated and the question is whether, when a corporation is created by the laws of one state, and then becomes consolidated with the corporations of other states by virtue of the laws of the state of its creation and the other states, and then changes its name, and is sued by that name in a court of the state of its creation by a corporation of the same state, one of the corporations created by the laws of another state can go into the State Court and have the cause removed into the Federal Court.

When the suit was brought in the State Court against the Lake Shore & Michigan Southern Railway Company, we must assume that the corporation meant was that created by the laws of Illinois. The laws of other states which created the corporations of those states had no force in the state of Illinois, except by virtue of its legislation, and therefore the consolidated corporation of that state became such by the laws of Illinois, and the result of the combined legislation of the several states was that, as to Illinois, the corporation of that State was the sole representative of the other corpora-

tions. It may be said, therefore, that in consequence of the legislation of the various states, the corporation of each state became an integral part of the consolidated railroad company between Buffalo and Chicago, whose interests were in common, and yet as regards the respective corporations, each was a legal entity, existing by virtue of the laws of the state of its creation. This, I understand, is the effect of the decisions of the Supreme Court of the United States upon this subject.

It is claimed on the part of the original defendant, that this case is like that of the *St. Louis, Alton & Terre Haute Railroad Company vs. The Indianapolis & St. Louis Railroad Company*,[1] and therefore that case in principle decides this, because it was there held that the Federal Court had jurisdiction. That was an original bill filed by a corporation of the state of Illinois against corporations of Indiana and Pennsylvania, the Indiana corporation being consolidated, it is true, with a corporation of Illinois, the plaintiff in the suit. This is not a suit brought by a New York corporation, an integral part of this consolidated company, against an Illinois corporation, but it is a suit brought by an Illinois corporation against another Illinois corporation, an integral part of a consolidated company, of which the New York corporation also constitutes a part. It may be that where there is a consolidation under the laws of different states, of the corporations of those states operating a railroad, that one of the corporations can file a bill in equity in the Federal Court for the protection and maintenance of its own interests, against another corporation, part of the consolidated company, and created by a different state from that of the plaintiff, but that is not this case. It cannot be said that this is a controversy wholly between citizens of different states, because it is a controversy between two citizens of Illinois, each being a corporation of

[1] 9 Bissell, page 144.

Illinois, and therefore it is a controversy in part only between the corporation plaintiff and the corporation defendant that seeks the removal of the cause.

Neither is this case like that of the *Chicago & Northwestern Railway Company vs. The Chicago & Pacific Railroad Company*,[1] where the plaintiff, although consolidated with a corporation of Illinois, sued as a corporation of Wisconsin. The principle contended for, as I understand, by the defendant in the original suit, amounts to this: that because a person is sued in a State Court by a citizen of that state, and a citizen of another state is jointly interested with the defendant in the subject of controversy on which the suit is brought, the non-resident citizen has the right to go into the State Court and ask for the removal of the cause to the Federal Court. I do not think that that principle can be maintained, and therefore I shall refuse to take jurisdiction of this case.

NOTE.—Where two corporations of two different states are consolidated under one name, they cannot join in bringing a suit in the Federal Court against a defendant, a resident of one of the states creating one of the corporations. The two corporations under the law concerning the jurisdiction of the Federal Courts on account of the place of residence of the parties, are regarded as entirely distinct and separate; and the fact that their principal place of business is in one of the states does not alter the rule. *Ohio & Mississippi R. R. Co. vs. Wheeler*, 1 Black 286.

But a citizen of one state may sue in the Federal Courts a corporation of another state, although that corporation is consolidated with a corporation created by his own state. *C. & N. W. R'y Co. vs. Whitton*, 13 Wallace, 270.

Where a corporation of Kansas was allowed by the laws of the state of Missouri to purchase a line of railroad in that state without being incorporated there, it was *held*, in a suit brought in the State Court of Missouri by a citizen thereof, to recover for injuries sustained on the line of road in that state, that the corporation was there a citizen of the state of Kansas, and as such entitled to have the cause removed into the Federal Court. *Williams vs. M., K. & T. R'y Co.*, 3 Dillon, 267.

So also where a railroad company which was incorporated in

[1] 6 Bissell, 219.

one state leased a line of railroad lying in another state, and operated the same as owner thereof, and an injury occurred on such leased line of road, it was held that the corporation was entitled to have removed to the Federal Court a suit brought in the State Court by the representatives of the injured person, residents of that state, to recover damages against it for such injury, on the ground that it was only a citizen of the state where it was incorporated, and that the leasing of lines in another state did not render it a citizen of that state or deprive it of any rights as a citizen of a foreign state. *Railroad Company vs. Kooutz*, 104 United States. This last case overrules and reverses, *B. & O. R. R. Co. vs. Wightman's Adm'r*, 29 Grattan 431, the case being taken to the United States Supreme Court from the Court of Appeals in Virginia; and see also *B. & O. R. R. Co. vs. Cary*, 28 Ohio State, 208.

Where a suit against a corporation has been removed upon its petition from a state to the Federal Court, on the ground that there was in it a controversy between citizens of different states, and a motion is made by the plaintiff to remand the cause to the State Court, the burden of proof is on the corporation to show that it is not a citizen of the same state with the plaintiff. *Copeland vs. Memphis & Charleston R. R. Co.*, 3 Woods, 651.

For other cases upon this subject, besides those referred to in the opinion, see also, *Baltimore & Ohio R. R. Co. vs. Harris*, 12 Wallace, 65; *Marshall vs. B. & O. R. R. Co.*, 16 Howard, 314; *B. & O. R. R. Co. vs. Gallahue's Administrator*, 12 Grattan, 655; *Goshorn vs. Supervisors*, 1 West Virginia, 308; *Minot vs. Philadelphia, etc. R. R. Co.*, 2 Abbott's United States Reports, 323; *Copeland vs. Memphis & Charleston R. R. Co.*, 3 Woods, 651.

ALMA KEMNA vs. THEODORE BROCKHAUS *et al.*

CIRCUIT COURT—EASTERN DISTRICT OF WISCONSIN—JANUARY, 1881.

1. CHANGE OF CITIZENSHIP.—To effect a change of citizenship from one state to another, there must be an actual removal, an actual change of domicile, with a *bona fide* intention of abandoning the former place of residence and establishing a new one, and the acts of the party must correspond with such purpose.

2. EVIDENCE—INTENTION OF PARTY.—And in such case it is competent for the party to testify to his purpose and intention as connected with his acts, where they are brought in question.

Jenkins, Elliott & Winkler, for plaintiff.

Cotzhausen, Sylvester & Scheiber, for defendants.

DYER, J.—This case has been heard upon a plea to the jurisdiction of the court. The complaint alleges that at the time of the commencement of the suit the plaintiff was a citizen of the state of Minnesota. The plea avers that she is, and always has been, a citizen of the state of Wisconsin, of which state the defendants are citizens, and proofs have been taken on the question of the plaintiff's residence and citizenship. The general rule upon the subject of citizenship is well settled. It is that, "in order to give jurisdiction to the courts of the United States, the citizenship of the party must be founded on a change of domicile, and permanent residence in the state to which he may have removed from another state. Mere residence is *prima facie* evidence of such change, although, when it is explained and shown to have been for temporary purposes, the presumption is destroyed. The intention is to be collected from acts."[1] "If a citizen of one state

[1] *Butler vs. Farnsworth*, 4 Washington, 101.

should think proper to change his domicile, and to remove himself and family * * * * * into another state, with a *bona fide* intention of abandoning his former place of residence, and to become an inhabitant or resident of the state to which he removes, he becomes immediately upon such removal, accompanied with such intention, a resident citizen of that state" within the meaning of the provision of the Constitution relative to the jurisdiction of the federal courts, "and may maintain an action in the Circuit Court of the state which he has abandoned. * * * Time, in relation to his new residence, occupation, a sudden removal back to the state he had abandoned after instituting a suit in the Circuit Court of that state; and the like; are circumstances which may be relied upon to show that his first removal was not *bona fide* or intended to be permanent, but they will not be sufficient to disprove his citizenship in the place of his new domicile and to exclude him from the jurisdiction of the Circuit Court for the district in which he had formerly resided; if the jury are satisfied from the evidence that his first removal was *bona fide* and without an intention of returning."[1] If there has been an actual removal, with intent to make a permanent residence, and the acts of the party correspond with the purpose, "the change of domicile is completed, and the law forces upon him the character of a citizen of the state where he has chosen his domicile."[2] A temporary return to one's former place of residence, with views and for objects merely temporary, does not revive a former citizenship.[3] "If the change of residence or citizenship is apparent only, and there has been, in fact, no change of residence, but only a transfer of apparent residence, *animo revertendi*, to give color of jurisdiction in a suit in the state of actual residence, it may not avail; but

[1] *Cooper vs. Galbraith*, 3 Washington, 554.
[2] *Butler vs. Farnsworth, supra.*
[3] *Burnham vs. Rangeley*, 1 Woodbury & Minot, 417.

where there is an actual change of residence and citizenship before suit brought, the motive to such change is not material, even if it was a desire to give capacity to sue in the courts to the United States."[1] Thus it appears that to effect a change of citizenship from one state to another, there must be an actual removal, an actual change of domicile, with a *bona fide* intention of abandoning the former place of residence and establishing a new one, and the acts of the party must correspond with such purpose.

The plaintiff in the present case is a married woman. She was married in January, 1879. Prior to her marriage she had always resided in Milwaukee. This was the home of her parents. After the marriage, and until August 5, 1880, she and her husband lived and kept house in that city. He is a person of foreign birth, and before his marriage to the plaintiff he had resided in Wisconsin two or three years. After marriage and while living in this state, he was employed as a traveling salesman for Chicago and Milwaukee houses. On the fifth of August, 1880, the plaintiff and her husband, with one child and a nurse, left Milwaukee and went to Minnesota. This suit was begun about September 17, 1880. It is not shown that the removal was made for the purpose of bringing a suit in this court, or that a suit was then contemplated. There is no proof that counsel had been consulted about a suit when the parties removed from the state. Before the departure they broke up housekeeping, and packed and put in store their household furniture. The plaintiff's husband, I conclude, from all the evidence, was then in limited circumstances pecuniarily, for the furniture was pledged for an advance of money under an agreement to pay exorbitant interest, and has since remained in Milwaukee incumbered by chattel mortgage. The testimony of the plaintiff is to the effect that arrangements were made to go to Glencoe, Minnesota,

[1] *Pond vs. Vermont Valley R. R. Co.*, 12 Blatchford, 293.

where her husband was to engage in mercantile business. They went first to St. Paul, she remaining there, and he going to Glencoe. She testifies that, on account of disagreements with the persons with whom he was to be associated, the business enterprise at the latter place failed, or was not entered upon, and he returned to St. Paul. There they rented furnished rooms, and, as she expresses it, kept house. Their child and nurse were with them. The plaintiff's husband, it appears, did not become established in any permanent business. His situation was evidently that of one seeking employment. Thus they were living when this suit was commenced, and so afterwards continued. Subsequently, but not until about the month of December, 1880, the plaintiff's husband entered into the service of a mercantile house in Chicago, as traveling salesman in Minnesota and Dakota. In the latter part of December they came to Milwaukee, and from that time to the present the plaintiff has remained at a hotel in this city, and her husband has been with her part of the time. It is not shown that they gave up or abandoned their rooms in St. Paul, and the plaintiff testifies positively that they came here to await the trial of this cause, and with the intention to return to St. Paul when it should be disposed of; and it seems that the plaintiff's husband returned to Minnesota before this hearing. The plaintiff has also testified that her purpose was to return to Minnesota as soon as the trial of this case should be concluded; that she and her husband went there in August to permanently reside, and for the purpose of making that state their permanent home; that their original intention was to locate in Glencoe, but on failure of the contemplated business enterprise there, they concluded to remain in St. Paul as their place of residence, and that when this suit was begun they had no intention of returning, and have not since intended to return to Wisconsin to reside.

These are the prominent features of the plaintiff's testimony. There are other portions of her testimony which, it is proper to remark, ought to be considered with a good deal of allowance, such as that relating to her husband's business affairs, his personal intentions, his supposed naturalization as a citizen, and his voting at the election in St. Paul; because, presumably, her knowledge of those matters was obtained by communication from him.

But the question is, do not the facts, to the extent that they are established by testimony which the court ought to accept as pertinent and legitimate, make a case of citizenship in another state, within the rule laid down by the authorities? Since the question is one of mixed law and fact, and since so much may depend upon intention, in connection with the acts of the party and the circumstances of the case, it is sometimes difficult to determine when there has been such a change of domicile as destroys a former citizenship and establishes a new one. The plaintiff has testified, under objection, to the intentions and purposes of herself and husband. It is true, as argued, that intention is to be collected from acts, and therefore it is not competent for a party to prove his own declarations of intention, made before any act done, in order to give character to his subsequent acts. But where acts *have been done*, such as actual removal from one place to another, it is, I understand, competent in a case like this for the party to testify to his purpose and intention as connected with those acts, when they are brought in question, precisely as, in a case where fraud is charged, an actor in the transaction may be asked directly whether any fraud was intended. It is, of course, the duty of the court in such cases to scrutinize the acts, to see if they correspond with the alleged purpose. It is apparent that the circumstance of the plaintiff's return to Milwaukee in December was one, which, if unexplained, would tend to throw doubt upon the

permanency of the alleged settlement in Minnesota. But if her return was for an object merely temporary, as she alleges, then her domiciliary *status* in that state would not be affected.

Comment was made upon the fact that the plaintiff's husband pledged their household furniture and left it in the hands of a pawnbroker, at the time they removed to Minnesota, as a circumstance indicative of a purpose not to abandon their residence in Milwaukee. While the situation in which their furniture was placed has a bearing upon the pecuniary ability of the husband to engage in business, it has seemed to me that the fact that the parties broke up housekeeping, stored their furniture and pawned it for money, which must have enabled them to remove from the state, tends rather to corroborate the claim that the removal was made with a view of establishing a permanent residence elsewhere, than otherwise. The plaintiff's home had always been in Milwaukee. Here her parents and family resided. Why should these acts be done unless there was a *bona fide* intention to remove to another state? The court cannot infer that they were done merely to enable her to begin this suit in this court, in the absence of any proof tending in that direction.

To adopt the view taken by the learned counsel for the defendants, involves, as I conceive, the utter rejection of the plaintiff's testimony as quite unworthy of belief. I do not think it is sufficiently impeached to justify the court in so doing as to material matters whereof she speaks from avowed personal knowledge; and we have to settle the question upon the weight of credible evidence as it is now presented to the court. There was a breaking up by the parties of household life in Milwaukee. There was an actual removal to another state. There appears to have been an intention to remove to a fixed place in that state, followed by a change to another place, because of the failure of business projects. There was a continued residence in the alleged new domicile,

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JOSIAH KIRBY vs. THOMAS ARMSTRONG *et al.*

CIRCUIT COURT—DISTRICT OF INDIANA—FEBRUARY, 1881.

IN EQUITY.

1. PATENTS—INFRINGEMENT—PROFITS—BURDEN OF PROOF.—In a suit to recover the profits made by an infringement of a patent for an improvement in a machine, the burden is on the complainant to separate profits due to the improvement from the general profits of the business; and if he fails to show what proportion, if any, of the whole profits was produced by his improvement, he can only recover a nominal amount.

Mitchell & Holmes, for complainant.

Parkinson & Parkinson, for defendants.

GRESHAM, J.—Josiah Kirby filed his bill against Thomas Armstrong, Robert Armstrong, William L. Standish, and G. W. Geddes, charging that the defendants had infringed the complainant's letters patent, numbered 72,505, issued on the twenty-fourth day of December, 1867, for a new and useful improvement in bung cutting, with a prayer for an injunction and a recovery of profits. On the hearing before the Circuit Judge it was found that the defendants G. W. Geddes and William L. Standish had infringed the rights of the complainant as to the first, third and fourth claims set forth in the letters patent. The two last-named defendants were enjoined from the further using of the complainant's invention, and there was a reference to the master to take and state an account of the profits which the defendants had made by infringing.

The first, third, and fourth claims set forth in the complainant's patent read as follows: "*First.* That each bung is

cut by a fish-mouth chisel from a separate square block of wood of the same diameter as the bung, thus saving the material, and lessening the strain on the machine. *Third.* That the parts of my machine are so arranged that the chisel finishes one blank and partly cuts another at each operation, instead of cutting a single blank at each stroke. This enables me to accomplish the next feature, which is—*Fourth.* That the block fed into the machine at each stroke serves as a cutting board for the block already partly cut and on the chisel, thus giving a clean, smooth surface for the chisel to cut against, and securing the edges of the blank from fraying, and the edge of the chisel from injury."

It was agreed before the master that the defendants had manufactured 1,387 barrels of bungs and taps, which they sold for $7,928.40, and that after deducting the cost of material, expense of manufacturing and sale, there was left a net profit of $182. The master found that the use of the complainant's improvement contributed to the aggregate profits; that it was impossible, on the evidence before him, to separate the particular profits which resulted from the use of the complainant's invention, in connection with the other machinery, from the aggregate profits; and the burden being on the defendants to make the separation, which they had failed to do, the complainant was entitled to a decree for the entire profits. This finding of the master was based upon the ruling in the *City of Elizabeth vs. Pavement Co.* 97 United States, 126. Bung-cutting machines were in use before the date of the complainant's patent, which was for an improvement only in such machines. The defendants used a bung-cutting machine with the complainant's improvement applied, and the general business resulted in profits. The complainant sued the infringers for an injunction and profits. He has got his injunction, and the master has given him the entire profits of the business, on the ground that the defendants failed to

separate the profits traceable to the complainant's improvement from the general profits. It was not sufficient to entitle the complainant to a recovery of profits to show that gains had resulted from the general business. He was required to go further, and show by evidence what profits the infringers had derived from affixing to their machine his invention.

It is now well settled that if the complainant in a suit for an injunction and profits fails to show that the use of his invention in connection with other machinery, of which his invention is an improvement, has produced a definite part of the whole profits, his recovery of profits must be nominal only.[1]

The soundness of this rule is recognized in the *City of Elizabeth vs. Pavement Co., supra.* That was a suit to enjoin certain parties from infringing a patent issued to Samuel Nicholson for a new and useful improvement in wooden pavement, and for profits. The defendants, in their answer, amongst other things, alleged that they had constructed the pavement in accordance with a patent granted to John W. Brocklebank and Charles Trainor. In that case the profits received by the defendants were the fruits of the use of Nicholson's invention. It was not a case in which only a part of the profits had resulted from the use of the Nicholson improvement. The Nicholson pavement was a complete thing, consisting of a certain combination of elements which the defendants used as an entirety. The evidence failed to show that the Brocklebank and Trainor invention contributed to the profits realized; in fact, it tended to show that the use of this invention diminished the profits instead of increasing them. In deciding the case the court says: "It is not the case of a profit derived from the construction of an old pavement, together with a superadded profit derived from adding

[1] *Blake vs. Robertson*, 94 United States 728; *Garretson vs. Clarke*, 15 Blatchford, 70.

thereto an improvement made by Nicholson, but of an entire profit derived from the construction of his pavement as an entirety. A separation of distinct profit derived from Brocklebank and Trainor's improvement, if any such profit was made, might have been shown; but, as before stated, the appellants fail to show that any such distinct profit was realized."

The master should have found that the complainant was entitled to nominal profits only. Decree accordingly, with costs of the reference taxed against complainant.

NOTE.—See also *Calkins vs. Bertrand, post*, page 445 and *Putnam vs. Lomax*, printed in this volume of these reports, on page 546, where it was decided that in a case of a claim for damages for infringement of a patent, the profits which the patentee is deprived of on account of the manufacture of the article by the defendant, constitute the measure of damages; and the fact that every operative part of the article, was not covered by the patent does not alter the rule.

Where the complainants fail to show the profits or damages arising from the use, by defendant, of their patented improvement of a certain machine, they are entitled to only nominal damages. *Gould's M'f'g Co. vs. Cowing*, 12 Blatchford, 243; *Same vs. Same*, 14 Blatchford 315; *Garretson vs. Clark*, 15 Blatchford, 70.

In general, the infringer is liable for the whole profits derived from the infringement, unless it be shown that some portion of the profits were derived from the use of instrumentalities or improvements not covered by the infringed patent, and which co-operated with the patented invention in producing the result from which the profits accrued. *American Nicholson Pavement Co. vs. City of Elizabeth*, 1 Banning & Arden's Patent Cases, 439; *Elizabeth vs. Pavement Co.*, 97 United States, 126.

Where the infringed patent is for an art, a fair measure of the infringer's actual profits is the saving in the cost of production by the use of the appropriated invention, over the cost of production by the use of cognate means, used and available. *Wetherill vs. New Jersey Zinc Co.*, 1 Banning & Arden's Patent Cases, 485.

And where the complainant's invention consists of a combination of certain old elements to which some new features were added, the complainant is entitled only to the value of the improvements which he had added, and not to the license fee on the whole combination. *Ingels vs. Mast*, 2 Banning & Arden's Patent Cases, 24; *Webster vs. New Brunswick Carpet Co., Id.* 67; *Herring vs. Gage*, 15 Blatchford, 124; *Schil-*

Singer vs. Gunther, Id. 303; *Star Salt Caster Co. vs. Crossman*, 4 Banning & Arden's Patent Cases, 566.

If the complainant's patent consists in an improvement to a machine already in use, he must show the particular profits, which have accrued to the defendant from the use of such improvement, and is not entitled to the entire profits arising from the use of the machine. *Black vs. Munson*, 14 Blatchford, 265.

EUGENE B. MYERS vs. BERNARD CALLAGHAN *et al.*

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—FEBRUARY, 1881.

IN EQUITY.

1. COPYRIGHT IN COURT REPORTS.—In the absence of any express legislation to the contrary, the reporter of court decisions is entitled to a copyright in his volumes of reports for whatever is the work of his own mind and hand.

2. PUBLICATION.—The mere delivery of a number of copies to the state, is not necessarily a "publication" of a volume within the meaning of the statute as to copyrights.

3. MISTAKE IN COMPLYING WITH STATUTE.—The title page of a volume was deposited with the clerk of the District Court in 1867, but the note printed in the volume stated by mistake that it was "entered according to act of Congress in the year 1866;" *Held*, that the copyright was not lost by the error.

4. COPYRIGHT STATUTES—CONSTRUED LIBERALLY.—A claimant of a copyright must show that the provisions of the statutes on that subject have been complied with, but in view of what may be considered the inherent right of an author to his work, and the general object of the law, these provisions will receive a liberal construction.

5. INFRINGEMENT.—Where the court can see that the head notes of the

plaintiff's volumes have been freely used and copied from, in the preparation of the defendants' volumes, it will hold the latter to be an infringement of the copyright of the former.

6. BANKRUPTCY—RIGHT OF ACTION.—Until an assignee of the bankrupt's estate is appointed, the bankrupt has the right to pursue all proper legal measures for the protection of his interests.

7. ABANDONMENT OF COPYRIGHT.—Before the court will find that a party has abandoned his copyright, the evidence should be reasonably conclusive of that fact.

8. *Baker vs. Taylor*, 2 Blatchford, 82, commented upon.

J. V. LeMoyne, for complainant.

J. L. High and *Thomas A. Moran*, for defendants.

DRUMMOND, J.—This is a bill filed by the plaintiff against the defendants for an infringement of the rights of the plaintiff under the copyright laws of the United States. The bill alleges substantially the following facts:

From 1865 to 1868, the plaintiff and Horace P. Chandler constituted a business firm for publishing law books, and as such firm they became the proprietors of volumes 32, 33, 34, 35, 36, 37 and 38 of the Illinois Reports. Norman L. Freeman was the reporter, under the law and by the appointment of the court, of the volumes of the reports; and the firm purchased all the proprietary rights of Freeman, and paid him a valuable consideration therefor, he agreeing that the firm should have the copyright of all of said books. The firm published a considerable number of copies of each of said volumes. In 1868 Chandler sold out all his interest to the plaintiff. The plaintiff was also the proprietor of, and entitled to the copyright in, volumes 39, 40, 41, 42, 43, 44, 45 and 46 of the Illinois Reports, of which Freeman was also the reporter, and from him the plaintiff purchased all his interest in those volumes. The plaintiff has published a large number of copies of each of these last named volumes, and still has the copyright to all his volumes of Reports from

32 to 46 inclusive. In 1877 the plaintiff reprinted volumes 37 and 38, and as some changes were made in the arrangement of paging the books, a copy of the printed title of each volume, and afterward, copies of the books themselves, were deposited in the office of the Librarian of Congress. The defendants had full knowledge of the exclusive rights of the plaintiff, and attempted to buy the same from him, but refused to pay the price demanded, and thereupon reprinted and published the volumes 32 to 38 inclusive, using the material contained in the volumes of the plaintiff, thereby violating the law of Congress upon the subject of copyright; not confining themselves to the use of the opinions of the court, but using the head-notes and statements of cases prepared by Mr. Freeman and making colorable changes only, thus trying to avoid the plaintiff's rights under the law. The defendants threaten also to republish other volumes copyrighted by the plaintiff, viz., volumes 39 to 46 inclusive of said reports. These acts, done and threatened by the defendants, have caused and will cause damage to the plaintiff, and therefore he asks that the defendants may be enjoined from publishing or selling any of the said books, and that the same so published may be forfeited to him, and that the defendants be required to deliver them up, and that an account may be rendered by the defendants of all the books published or sold, and that the defendants may pay the damages and costs which the plaintiff has sustained by their wrongful acts.

To this bill various defenses have been set up.

It is claimed that these being volumes of reports by a reporter, acting under the authority of law as a public officer, are not the subject of a copyright under the act of Congress.

It is also claimed that, even if they are the subject of copyright, the plaintiff has not complied with the act of Congress in the procurement of the copyright, and therefore none exists.

It is insisted, too, by the defendants, that the volumes which are charged to be an infringement of the plaintiff's copyright are themselves independent productions of different editors and annotators—Messrs. Ewell and Denslow—who were employed by the principal defendants, Messrs. Callaghan & Co., to edit those volumes.

It is also said that the plaintiff has acquiesced in the publication of the volumes of the defendants, and that he has lost the right to maintain a suit by his own laches; and, lastly, that the plaintiff has been adjudicated a bankrupt, and therefore cannot maintain this action.

It will be observed that the plaintiff claims under a purchase from the reporter. He was an officer of the state, and prepared the volumes under the authority of law, and it is insisted that, because he was a public officer, and acted in an official capacity, he had no copyright in these volumes. In one aspect of the case there would seem to be great force in this objection. For example, if an adequate compensation was paid by the state to the reporter for the work done by him in preparing volumes of reports, then whatever property there was in the volumes, arising from the labors of the reporter ought to belong to the state and not to him; but I cannot find that view was taken of the case by the state and the court in the appointment of the reporter at the time. On the contrary, it seems to have been considered that the reporter was entitled to any profits which might arise from the sale of these volumes, and that they constituted a part of the perquisites of his office. He was appointed under the authority conferred by section 20 of chapter 29 of the Revised Statutes of 1845, which required the court to appoint a reporter. Mr. Freeman was appointed under the act in 1863, and re-appointed in 1869, and then there appears to have been no regular salary. The office seems to have been different then from what it is now, when, it is said, adequate compensa-

tion is given by the state to the reporter for the services performed by him.

The case of *Wheaton vs. Peters*, 8 Peters, 591, as construed by the courts and the profession, has always been supposed to decide that Mr. Wheaton had a copyright in his reports, provided he had complied with the law then in force upon the subject. It is true that the majority of the court does not distinctly assert that he had that right, but it appears to be necessarily implied from the whole reasoning in the opinion of the majority, because the court remanded the case for the purpose of ascertaining whether the reporter had complied with the acts of Congress, something which clearly ought not to have been done, if the court was of the opinion that in no event was the reporter entitled to a copyright in his reports. Every reporter of the Supreme Court since has claimed a copyright—Peters, Howard, Black, Wallace and Otto, and so, it is believed, has every reporter in this country, State and Federal. It seems to me, therefore, that we must assume, in the absence of any express legislation by the state, indicating a contrary principle, that the reporter is at least entitled to a copyright in his volumes of reports, for what is the work of his own mind and hand—the head-notes, the statements which he has made in each case of the facts, and of the arguments of counsel, notwithstanding it may be true that he can have no copyright in the opinions of the court.

The copyright of these volumes of reports existed, if at all, under the Act of Congress of 1831, which provided that any one, in order to be entitled to the benefit of the act, must deposit before publication a printed copy of the title of the book in the clerk's office of the District Court of the district where the author or proprietor should reside; and, within three months from the publication of the book, a copy of the same must be delivered to the clerk of the said district: Sec.

4.[1] He must cause to be inserted in each copy of the book, on the title page or the page immediately following, these words: "Entered according to Act of Congress in the year , by A. B., in the clerk's office of the District Court of ." Sec. 5.

Various objections are made by the defendants to the copyright, because of non-compliance by the plaintiff with the provisions of the Act of Congress. It appears that 553 copies of volume 32 were delivered to the state by Mr. Freeman, the reporter, on October 2, 1865, while the proper certificate of that volume was not delivered to the clerk of the District Court until January 17, 1866; and it is insisted that the delivery of these volumes constituted a publication. There seems to be no further evidence on the subject than what arises from the fact of their delivery to the state. Whether they were distributed by the state, or retained until after the proper certificate was entered in the clerk's office of the District Court does not appear. It is argued that the delivery to the state constitutes *per se* a publication within the meaning of the statute: and as the certificate was filed after the delivery, there was no copyright to the volume for that reason. These were copies for the use of the state, and subject to distribution under the provisions of law: Secs. 23 and 24, Chap. 29, Illinois Revised Statutes, 1845. Can we assume, in the absence of any evidence upon the subject, that a distribution was made? Mere printing of a book is not necessarily publication, and I am inclined to think it was incumbent upon the defendants to show something more than a mere delivery of the copies to the state.

The title-page of volume 34, together with the printed volume itself, seems to have been filed in the clerk's office of the District Court, on the 23d of October, 1866, and it is claimed that this does not show that a proper certificate was filed in

[1] 4 United States Statutes at Large, 436.

the clerk's office, as required by the statute, before publication. It will be observed that the statute does not specify how long before publication the certificate should be filed. Here both acts seem to have occurred on the same day, and the presumption, I think, is, in the absence of any evidence to the contrary, that the filing of the certificate of title preceded the deposit of the volume in the clerk's office.

The title-page of volume 35 was deposited with the clerk of the District Court in January, 1867, and the note printed in the volume states that it was "entered according to act of Congress in the year 1866." There is no doubt this is a mistake in the imprint of the entry, as it should have been 1867 instead of 1866. The statute does not require that the note of entry should indicate the day or the month, but only the year; and if it be true that this mistake is fatal, then, of course, as to that volume, the copyright is lost.

But I do not feel inclined to give so rigid a construction to the statute. The case of *Baker vs. Taylor*, 2 Blatchford, 82, is cited as being conclusive against the validity of the copyright in this volume. That was a case which arose, like this, under the act of 1831. The title of the book was deposited with the clerk in 1846, and the notice of the entry, as printed in the book, stated that it had been made in 1847, and there was evidence tending to show the plaintiffs knew of the error before publication. That was an application for an injunction, which the court refused, holding that these facts deprived the plaintiff, of their copyright in the book under the act of Congress, notwithstanding the date may have been a mistake. The main difference between that case and this is, that here the entry states that the title was deposited in 1866, when, in fact, it was not deposited until 1867. The mistake arose probably from the volume having been printed in another state in 1866, and it was assumed that the certificate of the title page was filed in the proper office that year. It

may be admitted that there is no distinction in principle between that case and this; but it seems to be rather a hard rule to deprive a party of the product of his labor simply because a mistake of this kind has been made. The author or publisher has endeavored to comply in good faith with the provisions of the statute, but has committed an error, unintentionally, it is presumed, in stating the year. According to the imprint contained in the book in this case, the right would expire before it would according to the filing of the certificate of the title with the proper officer; and therefore, it would seem no one could be damnified by the error which was committed. In *Baker vs. Taylor*, *supra*, the court held there should be an exact compliance in every particular with the provisions of the statute, and the court remarks that in *Wheaton vs. Peters*, *supra*, the Supreme Court decided there must be a strict compliance with the provisions of law. I do not understand that the court has laid down the rule with such unbending rigor as seems to be implied in the case cited. Undoubtedly a majority of the court in the case of *Wheaton vs. Peters*, held that the law must be complied with; but they do not say that if there shall be a slip in any trifling particular, therefore the author is deprived of all right to the product of his brain and of his hand. Conceding that it is a right which must exist under the law, the question is whether, if that is substantially and in good faith complied with, it is not sufficient. It seems to me that it is.

It may be admitted, therefore, that every person who claims a copyright to a book, conferred by act of Congress, must show that the provisions of the act have been complied with. But there is what may be called the original right of the author. It is the object of the acts of Congress to "*secure*" the right which thus primarily exists. Indeed, statutes of copyright seem to imply the existence of a natural right of the author to the product of his brain. They

are passed in order to make that right after publication, in the language of the Constitution, "exclusive." So that I am not inclined to agree with the strict construction which has been placed on the acts of Congress by some of the courts. It seems to me, on the contrary, that these various provisions of law in relation to copyright should have a liberal construction in order to give effect to what may be considered the inherent right of the author to his own work.

It will be recollected that a majority of the judges, when the question first came before the Court of King's Bench in England as to the right to literary property, held, it existed at common law, independent of the statute of Anne; and that this ruling was reversed by the House of Lords, that court holding the right existed only by virtue of the statute, and that this opinion of the highest appellate court of England was followed by the Supreme Court of the United States in the case of *Wheaton vs. Peters, supra.* But it may be affirmed with some confidence that the decisions of both courts were considered by text writers and the profession as rather trenching upon the inherent rights of authors.

There are other objections to the copyright, as that the name of Myers is alone used in the entry, and the title filed with the clerk does not show the name of the publisher. But these do not appear to be sustained in law or fact.

In considering the question of infringement of the copyright by the defendants, it must be borne in mind what is the character of the work. They are reports of the decisions of the Supreme Court of this State, to which no one can have a copyright; but he may have, to the head-notes and statements of each case, and of the arguments of counsel. These head-notes and statements which have been made are in themselves an abridgment; the one of the opinions of the court, consisting of the principles of law decided, and the other an abstract of the facts and of the arguments.

It should also be stated that the volumes of the defendants, as edited by those employed by them, are very much condensed, as compared with Mr. Freeman's reports, and yet the paging of the volumes is substantially the same throughout, so that the cases in the corresponding volumes appear on the same page. The list of cases which precedes each report is the same. The defendants, Ewell and Denslow, who were employed by the other defendants to annotate these decisions or reports, both state, upon examination, that their work was independent of that of Mr. Freeman; but it appears from the evidence that all the volumes of Mr. Freeman were used in thus editing or annotating; and although it may have been their intention to make an independent work, it is apparent from a comparison of the Freeman volumes and those of the defendants, that the former were used throughout by the editors employed by the defendants. It is true that in each volume, perhaps in the majority of cases, there is the appearance of independent labor performed by them, without regard to the volumes of Mr. Freeman; but yet in every volume it is also apparent that Mr. Freeman's volumes were used; in some instances words and sentences copied without change, in others, changed only in form; and the conclusion is irresistible, that for a large portion of the work performed in behalf of the defendants, the editors did not resort to original sources of information, but obtained that information from the volumes of Mr. Freeman. Undoubtedly, it was competent for an editor to take the opinions of the Supreme Court, and possibly from the volumes of Mr. Freeman, and make an independent work; but it is always attended with great risk for a person to sit down, and with the copyrighted volume of law reports before him, undertake to make an independent report of a case. It is not difficult to do this, going to the original sources of information, to the decisions of the court, the briefs of counsel, the records

on file in the clerk's office, without regard to the regular volumes of reports. Any one who has tried it can easily understand the difference between the head-notes of two persons, equally good lawyers, and equally critical in the examination of an opinion, where they are made up independent of each other; and bearing in mind this fact, it seems to be beyond controversy, that although in many, and perhaps most, instances there is a very considerable difference between the head-notes of the defendants' volumes and those of the plaintiff, the latter have been freely used in the preparation of the former. I conclude, therefore, that the defendants have, in the preparation of those volumes, from 32 to 38 inclusive, of the Illinois Reports, used the volumes of the plaintiff so as to interfere with his copyright.

When this bill was filed, an application was made to the District Judge for an injunction against the defendants. That was refused, and I am inclined to think, properly refused. There is, no doubt, considerable testimony in this case to show that the plaintiff did not insist so sharply upon his rights under the law as he should have done, during the various interviews which took place when negotiations were pending between the parties for the sale of the plaintiff's right to these volumes, to the defendants. There is some conflict in the evidence, but, taking it altogether, there cannot be said to have been any consent on the part of the plaintiff to the publication made by the defendants. On the contrary, it would seem as though his conduct showed that he never intended absolutely to abandon what he considered his legal rights, under the law, to the publication of these volumes of reports. He, in fact, republished some of them, and gave notice of the publication of others. This shows that he had no intention to abandon his rights. Perhaps an explanation of some expressions used by the plaintiff, and of his conduct, may be found in the supposition that they would come to

terms, and that he would sell, and they would buy whatever rights he had. But admitting that the plaintiff was not so decided as he ought to have been, it must be also said that there was a good deal in the talk, and in the declarations of the defendants, which seemed to concede the rights claimed by the plaintiff, those of copyright among others; and in such a case as this, where there is a question of abandonment of a clear legal right once existing, by acquiescence, or laches, the testimony ought to be reasonably conclusive of the fact, before a court of equity would deprive a party of his rights under the law. I do not think that that testimony exists in this case, and therefore I hold that there was not that consent given by the plaintiff, or that abandonment of his rights, or acquiescence, or laches, which are claimed by the defendants.

The only other defense is that of the bankruptcy of the plaintiff. The answer made to that, and which seems to be satisfactory is, that until there is an assignee appointed of the bankrupt's estate, he has the right to pursue all proper legal measures for the protection of his interests. So that, on the whole, I think that the plaintiff is entitled to a decree in this case.

NOTE.—A provision in a state Constitution that all "judicial decisions shall be free for publication by any person" does not authorize a violation of the copyright in a volume of reports, prepared by a state reporter in pursuance of an act of the legislature. *Little vs. Gould*, 2 Blatchford, 165; S. C. *Id.* 362.

But the publication of an official report under the direction of Congress, for the benefit of the public, is a dedication of it and its contents, and any one may reprint it. *Hine vs. Appleton*, 4 Blatchford, 125.

And the reporter of the opinions of a State Court, where the head notes are prepared by the judges themselves, can have no copyright in the volumes which he edits. *Chase vs. Sanborn*, 4 Clifford, 306.

Unless a printed copy of the title page be deposited in the clerk's office, before publication, and a copy of the book be delivered to such clerk within three months after such publication, no valid copyright is acquired. *Struve vs. Schwedler*, 4 Blatchford, 23.

An omission to have the date of the depositing the title of a map

engraved thereon, is fatal to the copyright. *King vs. Force*, 2 Cranch's Circuit Court Reports, 208.

Words of description added to the title filed in the clerk's office, to secure a copyright may be changed in the public work without invalidating the copyright. *Daly vs. Palmer*, 6 Blatchford, 256.

Compilers of books which contain facts derived from common sources of information, must investigate for themselves from the original sources which are open to all persons, and cannot use the labors of a previous compiler, *animo jurandi*, and the subsequent compiler cannot save his own time by copying the results of the previous compiler's study, although the same results could have been obtained by independent labor. *Banks vs. McDivitt*, 13 Blatchford, 163.—[REPORTER.

In re PETITION OF DAVID M. KELLY vs. THE RECEIVER OF THE GREEN BAY & MINNESOTA RAILROAD CO.

CIRCUIT COURT—EASTERN DISTRICT OF WISCONSIN—FEBRUARY 1881.

IN EQUITY.

PAYMENT OF RAILWAY INDEBTEDNESS—LIENS—ESTOPPEL.—In this case the petitioner paid an indebtedness of the railway company, incurred on account of construction:

Held that in order to give him a superior equity to the bondholders, it must be alleged and proved that he acted under such inducements from them and had such dealings with them in the transaction, as estop them from asserting their liens against his claim. It is not sufficient that the original indebtedness was incurred at the request of the bondholders.

E. H. Ellis, and *Finches, Lynde & Miller*, for petitioner.

E. C. & W. C. Larned, and *T. G. Case*, for receiver.

DYER, J.—This is an intervening petition by David M. Kelly, asking for the allowance of a claim of nearly $300,000, against the receiver of the Green Bay & Minnesota Railroad Company. The petition is demurred to, and it is contended by the receiver that upon the facts stated in the petition, the petitioner's claim cannot be recognized as one entitled to priority over the bondholders' mortgage lien.

The material allegations of the petition are, that in 1872 the Lackawanna Iron and Coal Company of Pennsylvania, loaned to the railway company $251,500, for which the latter company gave to the Iron and Coal Company, its promissory note, payable February 20th, 1873, and bearing interest at seven per cent. from November 20th, 1872, and that the loan was made for the purpose of enabling the railway company to complete the construction of the road from Fort Howard, Wisconsin, to a point on the Mississippi river, opposite the city of Winona.

It is further alleged that contemporaneously with the giving of the note, the petitioner, at the request and in behalf of the railway company, and upon demand of the Iron and Coal Company, deposited with the last named company, 55,331 shares of the capital stock of the railway company as collateral security to said loan, which stock was the property of the petitioner and exceeded in value the amount of the note and interest; that the petitioner was at the time, the contractor of the railway company by whom the road was constructed, and that at the request of the railway company, the petitioner paid from his own personal funds, on the 20th day of February, 1875, the full amount, principal and interest, then due on the note, namely: $293,038.11. It is alleged that this payment was made by petitioner for the benefit of the railway company and of the bondholders, and that he has

not been reimbursed the money which he so advanced in payment of said note.

It is further alleged, that long before this loan was effected, and at the time the same was made, and ever since that time, the bondholders, at whose instance the receiver in the present foreclosure action was appointed, were and have been in the actual control and management of the affairs of the railway company through and by means of the directors and other officers of the company as their agents nominally in control of the company and its officers, but actually under the control of the bondholders; and that the bondholders, who were also stockholders, authorized and directed the loan to be made for the purpose of constructing said road, and also authorized and directed the expenditure of the amount of the loan in construction of the road, and that the same was, accordingly, with their knowledge and assent, expended in such construction.

Further, that the Iron and Coal Company was a stockholder of the railway company, and, as such, also knew that the money so loaned by it was to be, and was actually expended in construction; and that such work of construction was done, not only with the consent and approval of the Iron and Coal Company but at its request and by its direction.

It is then alleged that the loan was absolutely necessary for the completion of the road, and that without such loan the road could not have been built, and the bonds of the railway company would have been of little or no value, that the loan was effected for the purpose of giving value to the bonds, and to the mortgages in suit; that the bondholders, by means of said loan, gave to the securities held by them their principal, if not their entire value; and that by reason of the premises the petitioner has a lien superior to the rights and equities of the bondholders, and that his claim to be reimbursed the amount advanced in taking up the note, is a prior

lien upon the railroad and the property of the railway company.

It is further alleged that the trustee in the mortgages foreclosed in this action, and all the bondholders and stockholders of the railway company had knowledge of the facts set forth in the petition as they occurred, and especially of the facts and circumstances relative to the loan, and the payment thereof by petitioner for the company, and that all of said transactions took place with their full knowledge and consent.

There is also a general allegation that the present action to foreclose the first and second mortgages upon the road is a collusive one, and is prosecuted, in fact, for the benefit and under the management of those bondholders who hold and control a majority of the stock of the company, and for the purpose of avoiding payment of the petitioner's claim.

The prayer of the petition is, that an order may be entered, establishing and allowing, as against the bondholders, the alleged right and claim of the petitioner to the sum of $293,038.11, with interest, and directing the receiver to pay the same out of the earnings of the road; or, if such earnings shall not be sufficient for that purpose, then that petitioner's demand may be paid out of the proceeds of the sale of the mortgaged property, before payment of any part of such proceeds to the holders of bonds.

The main points of the argument advanced in support of the petition are, that the moneys borrowed from the Iron and Coal Company were used by the railway company to complete its unfinished road; that the loan was effected and the expenditure made at the request and under the direction of the bondholders, and that the new construction thereby accomplished gave value to the bonds; that if the bondholders had taken possession of the road before this money was advanced and expended, their security would have been comparatively

valueless; that if there had been unfinished road in process of construction when the receiver took possession, the court could have ordered him to complete the construction at the expense of the property and for the benefit of the bondholders; and if the court could and would have authorized the receiver so to act, it can, and in justice to the petitioner should direct, that the advance which he made in taking up the obligation of the company thus incurred for construction purposes, be made a charge upon the property superior to the mortgage liens.

I have carefully examined the authorities cited on the argument, and there is no doubt that in the case of a railroad in the hands of a receiver appointed by the court, circumstances may exist requiring the expenditure of money by the receiver for new or additional construction, and that in such circumstances the court, for the purpose of conserving the property and protecting the interests of bondholders, may direct such expenditures to be made. Since the exercise of such a power would be extraordinary, the necessity should be great and the right of the court under the circumstances of the case should be clear.

Undoubtedly, also, before any legal proceedings are instituted by the bondholders or their trustees, to make their securities available, the bondholders may exercise such control over the property and may so request and sanction the act of a third party in advancing money for the benefit of the property, as to estop them from setting up their mortgage as a lien paramount to the claim of one who had thus acted on the faith of their request or direction. The theory of the present petition evidently is, that the alleged acts of the bondholders in connection with the loan by the Iron and Coal Company to the railway company, should be held to have operated as an estoppel *in pais*, and that therefore they cannot now assert their mortgages as liens superior to the petitioner's alleged

right in equity to charge the property with the payment of his advances. Since all expenditures by a railroad company for construction or permanent improvement may enure more or less to the benefit of holders of its bonds, and since the effect of such an estoppel as has been spoken of, must be to displace the mortgage lien, it is clear that to create an estoppel a plain and undoubted case should be made. It is not sufficient to say that some of the bondholders, or a majority of them, or such as have been most active and influential in promoting the concerns of the road, have done acts which as to them, create a superior equity in favor of a third party who has made advances. For in such case the transaction would have to be regarded as one between individual bondholders and such third party. The mortgage lien as an entirety can only yield to such equitable claim when acts have been done which bind all the bondholders because directed and sanctioned by all. And I am inclined to the view that in the present petition, the pleader intended to be understood as alleging that all the bondholders directed the loan from the Iron and Coal Company to the Railway Company to be made.

Although the petition probably alleges enough to show that the bondholders approved and even requested and directed the original loan by the railway company to be made for the purpose of new construction, and the moneys to be so expended, I am of the opinion that it is fatally defective for want of allegations to the effect that the petitioner's personal connection with the transaction was the result of requests, directions or promises of indemnity to him on the part of the bondholders. The allegations in this behalf are, that he was the contractor for the new construction, and that at the request of the railway company and upon the demand of the Iron and Coal Company he deposited stock as collateral to the loan, and that at the request of

the railway company, which was unable to pay the note, he advanced for the company, and paid from his own personal means, the indebtedness represented by the note. This is the scope of the allegations in respect to the petitioner's personal connection with the transaction. It is true, it is further stated that the payment was made for the benefit of the railway company and of the bondholders, who, it is alleged, had the management and control of the company to the extent before pointed out. But it does not follow from the fact that the bondholders may have authorized and requested the original loan to be made and the moneys to be expended, that the petitioner could by the subsequent payment of the debt for the accommodation of the company, acquire an equity over then existing mortgage liens. If his action was merely that of a volunteer, it will not be doubted that he could not maintain his claim as against the mortgagees. And to give him a superior equity on account of his payment of the company's indebtedness, it must be alleged and shown that he acted under such inducements from the bondholders, and had such dealings with them in the transaction, as estop them to assert their liens against his claim. As before indicated, it is not enough to say that his money, for which he now seeks reimbursement, has gone into the road and that the bondholders have been benefited thereby.

Before relieving the company by payment of its note, the petitioner could have required from the company and its secured creditors express security of a character at least co-equal with the mortgages, if not superior to them, and in the absence of such security, the mortgage liens could only be displaced by such affirmative acts on the part of the bondholders as would in equity operate to estop them from asserting those liens in hostility to him. In this connection it is to be borne in mind, that upon a mere showing that the petitioner paid an indebtedness of the company incurred on

account of construction, and in the absence of allegation and proof of such special facts and circumstances as would raise an estoppel against the bondholders, the petitioner's claim could not be enforced because not within the six months' rule which prevails in this circuit.

The allegation that the foreclosure suit in which the present intervening petition is filed, is a collusive action, and prosecuted for the benefit of bondholders, and to avoid the payment of petitioner's claim, cannot, I think, avail the petitioner, because it is not shown wherein the suit is collusive or irregular, or wherein the bondholders or their trustee are prosecuting it wrongfully or without right.

For the reasons stated, I am of opinion that the demurrer to the petition should be sustained; but if it shall be the view of counsel for the petitioner that a case can be stated that shall come within the principles laid down in this opinion, leave will be granted to file an amended petition within ten days.

J. C. WALKER vs. GEORGE E. GOOCH *et al.*

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—FEBRUARY, 1881.

1. CONTRACTS—CONSTRUCTION OF.—A. contracted to deliver B. "75 boxes Kingan's Cumberland Cut Bacon," and the goods were warranted "to be of the choicest quality of grade and brand." Kingan & Co. put up two brands of bacon, marked respectively "Kingan's Packing Co. Cumberland Cut Bacon," and "Taylor's Cumberland Cut Bacon," both of equal quality; but at the place where the goods were delivered the former was considered as more choice: *Held*, that the contract called for the former brand.

2. KNOWLEDGE OF PARTIES.—The fact that the former brand was forwarded exclusively to an agent, and that the latter brand was in the general market, makes no difference unless both parties had knowledge of such fact.

3. WARRANTY OF GOODS—SALE BY CONSIGNEE.—The contract provided that if the goods were not of the brand and grade called for, the "sale to be voided, and goods sold for account" of the vendors. The vendee had notice by bills of lading and invoices, of the brands of goods forwarded him, and paid the drafts drawn on him, received the goods and sold them for account of vendors. The court having *held*, that the goods delivered were not the ones contracted for: *Held*, further, that it was not the duty of the consignee to refuse to receive the goods shipped, and that he was entitled to recover the difference between the proceeds of the goods and the price paid under the contract.

Edward A. Dicker, for plaintiff.

Joseph Wright, for defendants.

BLODGETT, J.—This is an action on a guarantee by defendants on the sale of a quantity of meats to plaintiff.

Plaintiff in November, 1876, was a dealer in provisions in Liverpool, England. Defendants were dealers in cured meats

in the city of Chicago; and one R. H. Rose was agent for the defendants in Liverpool. On the 24th of November, Rose, as agent for defendants, by contract in writing, sold to plaintiff "75 Boxes Kingan's Cumberland Cut Bacon" for shipment from Indianapolis during November, at 42 shillings per hundred weight; and "50 boxes Thallon's Stafford Middles," at 44 shillings per hundred; "Goods all warranted to be of choicest quality of grade and brand, or sale to be voided and goods to be sold for account of Gooch & Barber."

At the time this sale was made, Kingan & Co. were packers of meats in Indianapolis, Indiana, and John Thallon was a packer of meats in Chicago. Kingan & Co. put up for the Liverpool market a brand of bacon marked, "Kingan's Packing Co. Cumberland Cut Bacon, Indianapolis, Indiana," which was forwarded exclusively to an agent of Kingan at Liverpool for sale there. It was not in the hands of general brokers here for sale. Kingan also put up another brand of bacon marked "Taylor's Cumberland Cut Bacon, Indianapolis," which was in the general market, and bought and sold through brokers here and abroad. Thallon put up a brand of "Middles" for the Liverpool market and forwarded them only to his agent at that place, marked, "John Thallon's Stafford Middles"; and he also put up another brand marked "Empire Packing House Stafford Middles," which were also in the general market like Taylor's bacon.

The proof leaves the exact wording of these brands somewhat in doubt, but makes it clear and undisputed that one of the bacon brands bore the name of Kingan, and one of the Thallon brands bore the name of Thallon.

The defendants filled this contract by shipping to plaintiff 75 boxes of bacon marked with the Taylor brand, instead of the Kingan brand, and 50 boxes "middles" branded with the Empire Packing House brand, instead of the Thallon brand; but the proof shows that the "bacon" was in fact packed by

Kingan & Co., of Indianapolis, and the "middles" were in fact packed by John Thallon, and that the quality of the goods was equal to those bearing the names of Kingan and Thallon.

At the time of shipment defendants drew on plaintiff at 60 days sight for the purchase price of the goods, less the freight, and the drafts went forward with the bills of lading attached describing the goods, and defendants also forwarded to plaintiff by mail at the time of shipment invoices of the goods describing them by their brands or marks. Plaintiff accepted and paid the drafts in the due course of business, and on the arrival of the goods paid the freight and placed them in the hands of a broker to be sold, and brings this suit to recover the difference between the proceeds of the goods and the amount paid for them; plaintiff assuming that under the contract he had the right to sell the goods as the property of the defendants, if they did not answer the guaranty.

The only question in the case is whether defendants had the right to fill their contract with any other brands of meat than those bearing the names of "Kingan" and "Thallon" respectively?

The proof shows clearly that the brand of bacon known in the Liverpool market as "Kingan's Bacon," and the brand of middles known as "Thallon's Stafford Middles," "had a first class reputation and always brought the top market price" in Liverpool; and that the "Taylor" brand of Kingan's bacon, and "Empire" brand of Thallon's middles were rated as second class goods of those packers; and that on the arrival of these goods at Liverpool, the "Taylor" brand of bacon was worth in that market 38 to 40 shillings per hundred, and the "Empire" brand of middles was worth in the same market 40 to 42 shillings; while Kingan's bacon branded with Kingan's name, was worth from 45 to 46 shillings per cwt.,

and Thallon's middles, bearing his name in the brand, was worth 48 to 50 shillings per hundred.

The contract calls for "the choicest quality of grade and brand" and notwithstanding the proof in this case tending to show that contracts of this kind were filled by other dealers at about the time this contract was made, by the shipment of "Taylor" and "Empire" brands, I am of the opinion that the true construction of the contract called for the choicest brand of Kingan's bacon and Thallons middles, and the proof shows that the choicest brands of those packers were those bearing their respective names. The goods forwarded were not of those brands, and there was, therefore, a breach of contract. But it is urged that the goods branded with the individual names of these packers were not for sale by brokers generally, and, therefore, the parties to the contract must be presumed to have meant the class of goods which were so for sale by brokers. The reply to this is that there is no proof in the case tending to show that the plaintiff knew that only certain agents of Kingan and Thallon were authorized to sell goods bearing their individual names as part of the brand. The books are full of cases showing that parties have been compelled to pay damages for the non-performance of contracts for the sale of property which they did not own or control at the time they pretended to make the sale. So, if the defendant in this case saw fit to enter into a contract to sell goods they could not deliver, their inability to perform their undertaking is no defense; although the proof as to who had the sale of these "*choicest brands*" has some bearing upon the question as to what was meant by the terms used in the contract. But the proof leaves no doubt in my mind that the true meaning of the terms used requires the contract to be filled with goods bearing the individual Kingan and Thallon brands.

It is also urged in behalf of defendants that plaintiff had

notice by the bills of lading and invoices, of the brands of goods forwarded to him, and that he should at once have refused to receive the goods and pay the drafts if the invoices of the goods shipped showed they were not of the brand called for by the contract. I do not think this was the duty or right of the plaintiff under this contract. The contract provides that if the goods are not of the brand and grade called for, the sale is "to be voided, and the goods sold for account" of defendants. This, in effect, made the plaintiff the broker of defendants, and it became his duty to sell the goods for defendants' account, and to apply the proceeds to the payment of his advances as far as they would go. The contract may be said to be self-adjusting, and provided by its own terms for the contingency of the goods not meeting the guaranty, a very wise and proper provision, considering the circumstances under which such contracts are made; because, but for this provision if the goods were not such as responded to the terms of the contract, the plaintiff would have had a right to reject them, and they would have been left in a foreign port, perishable, and perhaps ruined, or largely deteriorated, before notice could be given to the owner. It was, therefore, wise to put into the contract a provision that the plaintiff should dispose of the goods as a broker for the defendants at the best price he could get. If the proceeds were insufficient to pay advances and expenses of sale, then defendants are liable for the balance.

It is not, perhaps, necessary to pass upon the question as to plaintiff's obligation to accept and pay the drafts in case the goods did not answer the contract, although I incline to the opinion that under this contract it was his duty to do so. He certainly had the right to accept and pay defendants' drafts drawn upon him, and on which drafts defendants had obtained the money, upon the faith that they would be so accepted and paid; and his refusal to do so might have worked most serious

injury to defendants' credit by dishonoring their paper in a market where it was of the utmost importance to them to keep their credit good.

I am, therefore, of opinion that plaintiff has made a clear case of right to recover, and should have judgment for the amount due, being the difference between the price paid for the goods under the contract and the net proceeds of the sale.

Judgment for plaintiff.

NOTE.—In *Powell vs. Horton*, 2 Bingham's New Cases, 668, the contract was to sell "mess pork of Scott & Co.," and it was held to mean mess pork manufactured by Scott & Co., and not merely consigned by Scott & Co.

So, where upon a sale of goods, a bill of parcels is given describing the goods sold, or designating them by a name well understood, such a bill is to be considered as a warranty that the goods sold are what they are thus described or designated to be. *Henshaw vs. Robins*, 9 Metcalf, 83.

Every person who sells goods of a certain denomination or description undertakes as part of his contract, that the thing delivered corresponds to the description, and is in fact an article of the species, kind and quality expressed in the contract of sale. *Hastings vs. Lovering*, 2 Pickering, 214; *Hogins vs. Plympton*, 11 do. 97; *Shepherd vs. Kain*, 5 Barnewall & Alderson, 240; *Barrekins vs. Bevans*, 3 Rawle, 23.

Upon a sale of goods to be delivered according to description of kind and quality, but which are not specifically ascertained at the time of the contract, it is a condition of the contract for the seller to deliver goods answering to the description contracted for. Leake on Contracts, 406; *Randall vs. Newson*, L. R. 2 Q. B. D. 109; S. C. 46 L. J. Q. B., 263; *Tye vs. Fynmore*, 3 Campbell, 462.

But where goods are branded under state inspection law, a description of them in a bill of parcels as a certain brand, is only a warranty that they were so branded, and not that at the time of delivery, they are equal in quality in all respects to the brand of that name. *Winsor vs. Lombard*, 18 Pickering, 57.

But in New York, words of description in a contract or a bill of parcels, do not imply a contract of warranty that the property is of the kind, quality and description specified. *Seixass vs. Woods*, 2 Caines, 48; *Hotchkiss vs. Gage*, 26 Barbour, 148; *Waring vs. Mason*, 18 Wendell, 425.—[REPORTER.

STATE OF INDIANA *ex rel.* CHARLES RICE vs. L. D. BALDWIN, SHERIFF *et al.*

CIRCUIT COURT—DISTRICT OF INDIANA—FEBRUARY, 1881.

ATTACHMENT—LIABILITY OF SHERIFF FOR PROPERTY.—Where the sheriff redelivered attached property to the defendant by direction of the plaintiff; and prior to the dismissal of the suit, a second creditor—under the Indiana Statute—became a party to the action: *Held*, that such second creditor could maintain an action against the sheriff for allowing the attached property to go from his control without an order of the court.

Osborn & Herr and *Baker, Hord & Hendricks* for plaintiff.

Harrison, Hines & Miller, for defendants.

GRESHAM, J.—The complaint avers that on the 22d day of September, 1876, Jason Wilson and Adam Wolf began an action in attachment, in the Grant Circuit Court, against Isaac Crosslet, John B. Graves, Samuel Pugh, and Daniel Mitchell; that on the same day the writ of attachment which came into the hands of Lancaster D. Baldwin, as sheriff, was levied by him on a lot of lumber, shingles and lath, of the value of $5,000, the property of the attachment defendants; that on the 1st day of February, 1877, while the suit and attachment proceedings were still pending and undisposed of, the relator, Charles Rice, filed his complaint, affidavit and bond in attachment under the proceeding of Wilson and Wolf, and became entitled to the benefit of the same; that on a subsequent day Wilson and Wolf appeared in open court and dismissed their action and attachment; that thereafter, to

wit: on the 26th day of September, 1877, Rice recovered judgment against the attachment defendants, on his cause of action for $3,619.94, and at the same time obtained an order for the sale of the attached property, and an application of the proceeds to the payment of his debt; that, without the authority or orders of the court, Baldwin allowed the attached property to be taken from his custody, and wasted, sold or otherwise disposed of, and failed and refused, upon proper demand, to deliver the same to his successor in office, to be sold under the order of the court, and that Baldwin and the sureties on his bond are liable to the relator for the value of the attached property.

In the ninth paragraph of their answer, after admitting the commencement of the action, and proceeding in attachment by Wilson and Wolf, and the levy by Baldwin on the lumber, shingles and laths under the writ of attachment, as stated in the complaint, the defendants aver that before the relator filed his complaint, affidavit and bond, and attempted to become a party to the original proceeding, Wilson and Wolf and the attachment defendants agreed that one Mitchell, the agent of the attachment defendants, should take possession of the attached property, sell the same, and apply the proceeds to the payment of Wilson and Wolf's debt; that by direction of Wilson and Wolf and the attachment defendants, Baldwin, the sheriff, permitted Mitchell to take possession of the attached property, sell the same, and, with the proceeds, on the 11th day of January, 1877, pay Wilson and Wolf's debt in full; that, on the last named day, it was agreed by the parties, no other creditor having then become a party to the attachment proceedings, that the suit should be at once dismissed; but, by neglect, the same was not done until after the 1st day of February, 1877, when the relator filed his complaint, affidavit and bond, aforesaid, and that the attached property was thus sold, the debt of Wilson and Wolf paid,

and the agreement for the dismissal of the suit and the attachment proceeding entered into in good faith, and without any knowledge that the relator or any other creditor intended to file thereunder.

The tenth paragraph of the answer is in substance the same as the ninth.

There is a demurrer to the ninth and tenth paragraphs of the answer.

Section 165 of the Indiana Code[1] makes a writ of attachment a lien upon the property of the attachment defendant from the time it is delivered to the sheriff.

Section 186 authorizes any creditor of the defendant, upon filing the proper affidavit and bond, to become a party to the action and attachment proceeding at any time before the final adjustment of the suit.

Section 187 declares that a dismissal of the action or proceeding in attachment shall not operate as a dismissal of the action or proceeding of any subsequent attaching creditor.

Section 192 declares that the money realized from the attached property, after paying all costs and expenses, shall be paid to the several creditors in proportion to the amount of their several claims.

In *Shirk vs. Wilson*, 13 Indiana 129, it was held that the claims of other creditors filed under an attachment suit are liens from the time the original writ was placed in the hands of the sheriff.

The records in the clerk's office showed that Wilson and Wolf's suit in attachment was pending, and that the sheriff had levied on property of the attachment defendants when Rice filed his complaint, affidavit and bond.

The plaintiffs neglected to dismiss their suit, as they had agreed to do, and the defendants neglected to have the suit dismissed, as they might have done. The dismissal by Wil-

[1] Chapter 1, Part Second, Davis' Statutes of Indiana.

son and Wolf, after Rice had become a party to the proceeding, had no effect on any rights which Rice had acquired.

While Baldwin was not a party to the attachment suit, he was interested in having that suit dismissed before other creditors filed under it. But he neglected to inform the court of the payment of Wilson and Wolf's debt, the agreement to dismiss, and the disposition that had been made of the attached property, and Rice took the necessary steps to become an underfiling creditor, and proceeded in the regular way to judgment on his claim. The court also found that the property which the sheriff had seized was subject to the lien of Rice's attachment, and ordered that it be sold to pay his debt. Baldwin and his sureties are now sued because Baldwin failed to deliver the attached property to his successor in office for execution, and the defense is an indirect attack on the order of the court.

The court could, and perhaps would, have permitted Baldwin to set up the agreement between the original attachment plaintiffs and defendants, for the dismissal of the suit, in opposition to Rice's motion for an order to sell the attached property and have the proceeds applied to the payment of his debt.[1] But finding that the original suit in attachment was pending on the docket, that there had been no "final adjustment" of it by dismissal or otherwise, was Rice bound to go farther and inquire whether there was any private or outside agreement for its dismissal? I think not. What effect it would have had, if, before taking the necessary steps to become an underfiling creditor, Rice had known of the payment of Wilson and Wolf's debt, and the agreement to dismiss the suit, is not a question now before the court. The attached property was in the custody of the court for the benefit of Wilson and Wolf and all other creditors who saw fit to become parties to the proceeding. While the case remained on the

[1] *Adams vs. Balch*, 5 Greenleaf, 188; Drake on Attachment, sec. 304.

docket, unless the defendant substituted a bond for the attachment of the property, Baldwin was bound to hold it, not under the orders of the plaintiffs as in the case of an ordinary execution, but under the orders of the court, and have it forthcoming when demanded for execution.

His failure to do this was a neglect of his official duty, whereby Rice acquired a right of action against him and the sureties on his official bond. The surrender of the attached property to Mitchell by direction of Wilson and Wolf, and the defendants, was of course a protection to Baldwin against them. Rice is entitled to such damages as will indemnify him for Baldwin's neglect of official duty. Whether Rice is entitled to recover nominal damages only, or the amount of his debt, if the value of the attached property was enough to pay the debt, or an amount equal to what his *pro rata* share would have been had there been no agreement to dismiss, and the property had been held for execution, need not now be decided. It is sufficient in overruling the demurrer, to say that Rice has a right of action.

Demurrer to the 9th and 10th paragraphs of answer sustained.

NOTE.—The lien of a creditor filing under an original attachment proceeding against real estate which was commenced prior to the execution of a mortgage on such real estate by the attachment-defendant, is prior and paramount to the lien acquired by the mortgagee, although the date of the filing of such creditor's claim is subsequent to the execution of the mortgage. *Fee vs. Moore*, 74 Indiana, 319.

The right of creditors to file claims under an original attachment against a debtor, under the Indiana statute, terminates with the final judgment and order of sale of the attached property, the words "final adjustment," as used in such statute, meaning the judgment directing a recovery and ordering a sale of the property seized under the writ of attachment. *Cooper vs. Metzger*, 74 Indiana, 545.—[REPORTER.

CHARLES J. HELLIWELL *et al.* vs. THE GRAND TRUNK RAILWAY OF CANADA.

CIRCUIT COURT—EASTERN DISTRICT OF WISCONSIN—FEBRUARY, 1881.

1. BILLS OF LADING—CONTRACTS.—H. & Co. shipped flour from Milwaukee to London under a contract which required the defendant to transport the flour by boat to Ludington, thence by rail to Portland and from there by steamer to London. In an action to recover damages for delay of the flour at Portland, the plaintiffs claimed that the oral contract was that the flour should be shipped from Portland in the steamship "Argosy," but the bills of lading read, "upon the vessel called the Argosy (or other vessel of equal class for marine insurance.)" *Held*, that the bills of lading constituted the contract, and that the defendant had a right to ship on any vessel of equal class with the "Argosy" for marine insurance.

2. CONDITION EXEMPTING CARRIER FROM LIABILITY FOR DELAYS.—The bills of lading contained a condition that the defendant should not be liable for delays, in transporting the flour, occasioned by over-pressure of freight: *Held*, that the insertion of this condition in the contract gave no greater exemption to the carrier than it was entitled to by law.

3. OBLIGATION TO DELIVER WITHIN REASONABLE TIME.—In this transaction the obligations assumed by the defendant were the usual obligations of a common carrier, among which was that of transporting the flour to the place of consignment with all convenient dispatch, with such suitable and sufficient means as he is required to provide for his business.

4. OVER ACCUMULATION OF BUSINESS—RESPONSIBILITY FOR DELAY OF TRANSPORTATION.—If at the time of making the contract for shipment, the carrier had no doubt, and if the condition of business on its lines gave it no ground for doubting that suitable means would be at its command within the usual and ordinary time for conveying the flour from Portland to London, and if all reasonable efforts were seasonably employed to obtain such means, and the delay was solely occasioned by an extraordinary and unusual influx of freight upon its lines, arising subsequently to the making of the contract, the carrier would not be responsible for the delay.

5. LIABILITY OF CARRIER FOR DELAY.—But if at the time the contract

of shipment was made, there was already an accumulation of business on the carrier's lines, which incapacitated it, or might reasonably be expected to incapacitate it for transporting the flour within a reasonable time, and this was then known to the carrier, or might have been known by proper effort on its part, or if there were then reasonable grounds for belief on the part of the carrier that such was the state of the case at the time, then the carrier would be liable for the delay occasioned by such accumulation of business.

6. Duty of Carrier to Inform Shipper.—In such case it is the duty of the carrier to inform the shipper of the condition of business on its lines, and if it fails to do this and takes the freight in face of threatened inability to transport it with requisite dispatch, it will be held liable for the delay.

Van Dyke & Van Dyke, for plaintiffs.

G. W. Hazleton, for defendant.

Dyer, J., charged the jury as follows: This is an action brought by the plaintiffs, who compose a firm doing business in Milwaukee against the defendant company, to recover damages for the alleged failure of the defendant to transport certain quantities of flour which it undertook to carry from Milwaukee to London, England, within such time as it is claimed the same should have been transported and delivered to the consignee. From admissions contained in the answer, and from a stipulation put into the case by counsel for the respective parties, it appears that there is no controversy as to certain facts, viz:

That 7,558 bags of flour, of the weight of 140 pounds each, were delivered to the defendant for transportation; that the price to be paid for such transportation was 56 cents, gold, per hundred pounds; that the flour was to be transported by the Northern Transit Line from Milwaukee to Ludington, thence by the Flint and Pere Marquette Railway and the defendant's line of road to Portland; and thence by steamship to London.

It is stipulated that a certain tabular statement, which has been exhibited to you, correctly states the dates of actual delivery of the several shipments of flour to the Northern Transit Line at Milwaukee; the dates of departure from Milwaukee of the several steamers of that line laden with the flour; the names of such steamers; the quantity of flour by them, respectively, carried; the dates of arrival of the different shipments at Portland and of the delivery of the same on board steamships bound for London; the names of such steamships and the dates of their departure from Portland and arrival at London. And it is expressly stipulated that the Argosy left Portland March 27th, 1880, and arrived in London April 7; that the steamship Bothel left Portland April 2, and arrived in London April 22; and that the Argosy and Bothel and the steamships Herworth and Woodthorn, which two last named vessels carried the flour, were all employed by the defendant in the business of transportation, and were all vessels of equal class for marine insurance. All these are uncontroverted facts in the case. It appears that the flour was all delivered here in Milwaukee to the Transit Line at various dates between February 26th, inclusive, and March 19th, inclusive, the largest proportion being delivered on February 26th and March 2nd. It was shipped on various days between February 26th and March 19th, both inclusive, and arrived in Portland at different dates between March 13th, inclusive, and March 30th, inclusive; the most of it so arriving on and prior to March 19th. It was all carried to London on the vessels Woodthorn and Herworth. That part carried on the Woodthorn was delivered to her April 17th, 18th and 19th, and she sailed on the 19th, and arrived in London May 15th. That part of the flour carried on the Herworth was delivered to her April 27th and 28th, and she sailed on the 29th, and arrived in London May 15th, on the same day that the Woodthorn arrived.

Now, the first question which arises is: What was the contract under which the defendant undertook the transportation of this flour, and what were the rights, duties and obligations of the parties under such contract as they in fact made? The plaintiffs have contended that the flour was received by the defendant and shipped under a verbal contract alleged to have been made on the 25th, 26th and 28th days of February, 1880, by the witness Cole in their behalf with the witness Young acting in behalf of the defendant; and that this contract was, that the flour should be carried to Portland by the route and on the lines named, and should be shipped thence to London by the steamship Argosy. It has been claimed that by this alleged agreement, the defendant undertook absolutely that the flour should be carried on that vessel and no other. This claim of course wholly ignores the bills of lading in evidence which confessedly the plaintiffs subsequently received from the defendant's agent. Upon looking into the bills of lading we find that they provide that the flour shall be shipped at Portland "upon the vessel called the Argosy (or other vessel of equal class for marine insurance.)" And herein we see that the bills of lading differ from the alleged verbal contract in that they by their terms give the defendant the right to ship the flour on the Argosy or on any other vessel of equal class for insurance. It has been contended by the plaintiffs that with reference to the vessel on which the flour was to be shipped from Portland, the alleged verbal contract must prevail as against this provision in the bills of lading, while on the part of the defendant it has been claimed that the bills of lading constituted the contract on the subject. Upon the undisputed evidence, I am of the opinion, and must instruct you, that in all respects wherein the bills of lading did not limit the defendant's liability as a common carrier they constituted the contract between the parties; and therefore, so far as this question of

the vessel on which the flour should be shipped from Portland is concerned, the defendant was not bound to ship it on the Argosy alone, but had the right to ship it on that vessel or any other vessel of equal class with the Argosy for marine insurance. The contract then was that the defendant should take the flour in question at Milwaukee, convey it to Ludington by the Northern Transit Line, thence, by the Flint and Pere Marquette Railroad and the defendant's line, to Portland; and thence by the steamship Argosy or some other vessel of equal class for marine insurance, to London. The bills of lading contain a condition that the defendant should not be liable for delays in transporting the flour occasioned by overpressure of freight; and there has been a good deal of controversy on the trial as to the effect of this condition, and as to whether the condition was binding upon the plaintiffs as part of the contract. In view, however, of the fact, that in the opinion of the court, that clause, if regarded as part of the contract, would give no greater exemption to the carrier than it would be entitled to by law, all question as to whether that clause was part of the plaintiff's contract or not, becomes of no importance in the view of both counsel and the court, and it is therefore unnecessary to submit to you questions as to the character and effect of that condition, which otherwise might be material. It is claimed by the plaintiffs that the flour in question was not transported by the defendant and delivered in London with proper dispatch; that it was unreasonably detained in Portland after its arrival at that port; that these alleged delays were attributable to the fault of the defendant and to its neglect to furnish such means of conveyance and facilities for transportation as the company were, under its contract, bound to furnish to enable it to deliver the flour in London within a proper and reasonable time; and it is further claimed that in consequence and because of a decline in the price of flour between

the time when it is alleged it should have been delivered in London, and the time when it was actually delivered, the plaintiffs have been subjected to a loss which the defendant should make good to them.

It is insisted by the defendant that the flour was transported and delivered within a reasonable time, under the circumstances existing at the time; it is admitted that there was delay in forwarding the flour from Portland, but it is contended that the defendant was, when it made its contract with the plaintiffs, well supplied with the necessary equipments, facilities, and means for transporting all the freight which could be ordinarily expected to seek transportation upon its route; that the delay occurring at Portland was occasioned by a sudden and extraordinary influx of ocean freight which was beyond the defendant's control, and which it could not foresee and anticipate, nor by the exercise of any diligence provide for; and that it ought not to be held responsible for circumstances, which, as it is claimed, excuse the alleged delay in forwarding the flour. The obligations assumed by the defendant in this transaction were the usual obligations of a common carrier, among which was that of transporting this flour to the place of consignment with proper dispatch, that is, within a reasonable time after it was delivered to the defendant for shipment. This it was incumbent on the defendent to do, under this contract; and as to what is meant by reasonable time, perhaps no rule can be more satisfactorily laid down than that the transportion must be accomplished by the carrier "with all convenient dispatch with such suitable and sufficient means as he is required to provide for his business."[1]

The question of reasonable time is one of fact, and may be determined by the length of the journey, the modes of conveyance, the season of the year, the state of the roads,

[1]Hutchinson on Carriers, § 328.

the weather, "and any other circumstance which may properly be taken into consideration by a jury in finding whether the carrier has been guilty of unnecessary and improper delay"[1] This, then, was the general duty of the defendant; that is, to convey this flour to London, and there deliver it to the consignees within a reasonable time. Something has been said in the arguments of counsel as to the alleged failure of the defendant to have steamships at its command to receive this flour on its arrival in Portland. This was a through contract. It was, therefore, as much the duty of the defendant to furnish a vessel or vessels for the ocean transportation of this flour, as it was its duty to furnish cars to transport it from Ludington to Portland. It was not, however, necessarily its duty to have vessels in waiting at the very moment, or on the very day the flour should arrive in Portland; but it was its duty to provide means of conveyance by which reasonable dispatch should be afforded, and improper delay avoided. The law in such case exacts nothing unreasonable, but it does require diligence and reasonable promptness under the circumstances in furnishing means of conveyance. The fact that, if the defendant did not ship the flour on the Argosy, it had the right to ship it on any other vessel of equal class for marine insurance, did not in any manner relieve the defendant of its duty in the matter of forwarding the flour with proper dispatch. If it selected any other vessel than the Argosy, it was as much bound to transport the flour within a reasonable time as if the shipment was made on that particular vessel. It may be well to state to you further as a general proposition of law, with reference to the obligation of a common carrier to provide sufficient means of conveyance, that it is "the first duty of a carrier to provide himself with all the facilities and appliances for the transportation of such goods as he holds himself

[1]Hutchinson on Carriers, § 329.

out as ready to engage in the carriage of. He must put himself in a situation to be at least able to transport an amount of freight of the kind which he proposes to carry, equal to that which may be ordinarily expected to seek transportation upon his route," and he will not "be excused for not being provided with a sufficiency of conveyances and other means for the transportation of that which he may reasonably expect to be offered." But if there was delay in transporting any of the flour to Portland, or in forwarding it from that point, which under ordinary circumstances would make the defendant liable, it is claimed in its behalf that it was excusable delay, and that the defendant ought not to be held answerable therefor. There is testimony tending to show that there was, at that time, an extraordinary press of foreign export traffic, and such an accumulation at Portland of freight bound for foreign ports, as rendered it, as it is claimed, impossible to provide immediate ocean transportation.

Upon this question, and as to when or under what circumstances an over-pressure of freight will excuse delay, I instruct you that if, after the defendant took this flour for shipment, and after the performance of the contract to carry was begun, there occurred, without fault of the defendant, an extraordinary and unforeseen influx upon the defendant's lines, of freight for foreign export, and that the defendant was thereby unexpectedly incapacitated for forwarding the flour with usual dispatch, and that the delay of the flour was wholly occasioned by such unusual and unexpected pressure of freight, and not in any degree by negligence of the defendant, then and under such circumstances the defendant would not be responsible for such delay so occasioned. It would however, be the duty of the defendant, in such a state of the case, to forward the flour promptly after the causes of such excusable delay were removed. Putting the proposition in substantially the form of one of the instructions which I am

asked to give you: If at the time of making the contract with the plaintiffs for the transportation of this flour, the defendant had no doubt, and if the condition of business on its lines gave it no grounds for doubting that suitable means would be at its command within the usual and ordinary time, for conveying the flour from Portland to London, and if all reasonable efforts were seasonably employed by the defendant to obtain such means, and the alleged delay was solely occasioned by an extraordinary and unusual influx of freight upon its lines for foreign export, arising subsequently to the making of the contract with the plaintiffs, so that it was thereby rendered impossible for the defendant, without any negligence on its part, to procure a vessel or vessels to carry the flour within what would be, under usual circumstances, a reasonable time, then the defendant would not be responsible for the consequences of such delay.

On the other hand, if, at the time the defendant contracted to carry this flour, there was already an accumulation or press of business on its lines which incapacitated the defendant, or might reasonably be expected to incapacitate it for performing its duty, by delivering the flour in London within a reasonable time, and this was known to the defendant at the time, or might have been known or ascertained by proper effort on its part, or if there were then reasonable grounds for a belief on the part of the defendant that such was the state of the case at the time, the defendant would be liable for the delay, although it was occasioned by such accumulation or press of business. For in such case it would be the carrier's duty, if it would avoid liability, to inform the shipper of the condition of its lines, so that he might exercise his right to select some other line for the transportation of his property; and if the carrier, under such circumstances, fails to do this, and chooses to take the property in the face of threatened inability to transport it with requisite dispatch,

it must answer for the consequences of the delay. A carrier has no right to take a shipper's property for transportation, concealing from him at the time existing circumstances within its knowledge, or within its fair and reasonable means of knowledge, and not within the knowledge of the shipper, that may incapacitate it for the full performance of its duty in the transportation of its property, and then claim exemption from liability.

Whether upon this question the facts in this case are as claimed by the plaintiffs or as claimed by the defendant, you are to determine, and for this purpose you will look into the evidence. There is testimony on the subject of the increase of traffic on the defendant's road, and the accumulation of freight at Portland. * * * You will determine, upon all the testimony in the case whether the alleged increase of business and accumulation of export freight was sudden, unlooked for, and extraordinary, and occurring after the contract with the plaintiffs was made, or whether it existed at the time the defendant took the flour for transportation, or could have been, under all the then existing circumstances, reasonably anticipated. Testimony has also been given of the efforts made by the defendant to obtain steamers to carry this flour, and in this connection I should say to you that the mere fact that the defendant could not get steamers sooner than it did, would not relieve it from liability for delay, unless such inability was solely attributable to such over-pressure of freight as within the instructions I have given you would excuse the delay.

To aid you in passing upon the questions involved, you have, by the stipulation in evidence, as I have before stated, the dates when the flour was delivered to the defendant in Milwaukee, and when the shipment on the steamers of the Transit Line began; also, the dates of arrival in Portland, of delivery to steamships at that port, and of the sailing of the

steamships and of arrival in London, and other facts agreed upon in the stipulation, of which I have already spoken; and upon all the evidence, you will say whether this flour was delivered in London within a reasonable time after its delivery to the defendant; and if it was not, whether the delay is excusable within the principles of law which I have stated. If the flour was delivered within a reasonable time, under the circumstances of the case, or if it was not, and the delay was excusable within the principles the court has laid down, then the defendant is entitled to a verdict. If on the other hand, the flour was not delivered in London within a reasonable time after the defendant took it for transportation, and if the delay was not solely caused by facts and circumstances which made it excusable within the principles of law stated, then the plaintiffs ought to recover. * * *

If you should find the plaintiffs entitled to a verdict, the measure of damages would be the difference between the market value of the flour which was improperly delayed, at the time when it should have been delivered in London, and its market value when it was in fact delivered, which was May 15, 1880.

Verdict for plaintiffs for $1,500.

NOTE.—A carrier is not liable for a delay caused by a deep snow which made the road temporarily impassable. *Ballentine vs. Railroad*, 40 Missouri, 491; *Briddon vs. Railway Co.*, 28 Law Journal, 51. Or by a low stage of water in a navigable river, which rendered it impossible for the carrier to proceed to the place of destination. *Bennett vs. Byram*, 38 Mississippi, 17; *Silver vs. Hale*, 2 St. Louis Court of Appeals, 557. Or by the sudden freezing up of the canal or river upon which the carrier was to transport the freight. *Bowman vs. Teall*, 23 Wendell, 306; *Beckwith vs. Frisbie*, 32 Vermont, 559; *Harris vs. Rand*, 4 New Hampshire, 259. Or the washing out by a freshet of a bridge necessary for the carrier to cross. *Vicksburg, etc. R. R. Co. vs. Ragsdale*, 46 Mississippi, 458.

So where there is no agreement to transport the property within a prescribed time, the railway company is not liable for damage occasioned by delay caused by an unusual quantity of freight being delivered to it,

which was forwarded without preference in the order of its receipt, if its road was in good order and well equipped, and as many trains were run as could be safely. *Wibert vs. New York & Erie R. R.*, 12 New York, 245.

While railroad companies are bound to have all reasonable and necessary facilities and appliances for the transportation, without unreasonable delay, of the usual amount of freight offered, or which might reasonably be expected; they are not bound to be prepared for unusual and extraordinary contingencies, which no ordinary prudence could foresee. *Michigan Central R. R. Co. vs. Burrows*, 33 Michigan, 6.

And the carrier is not bound to use extraordinary exertions, or extra expense, to surmount obstacles caused by the weather solely. *Empire Transportation Co. vs. Wallace*, 68 Pennsylvania State, 302. Nor is he liable for delay occasioned solely by the recklessness or carelessness of another party. *Couger vs. Hudson River R. R. Co.*, 6 Duer, 375. *Taylor vs. Great Northern Ry. Co.*, Law Reports, 1 Common Pleas, 385; *Livingston vs. N. Y. C. & H. R. R. R. Co.*, 5 Hun 562.

A common carrier is excused for delay in the carriage of goods where the delay is caused solely by the armed violence of strikers, who were employés recently discharged from the carrier's employment. *P., Ft. W. & C. R. R. Co. vs. Hazen*, 84 Illinois, 36; *P., C. & St. L. R. W. Co. vs. Hollowell*, 65 Indiana, 188.

But where the delay was occasioned by the refusal of a large number of the carrier's engineers to work, on account of their dissatisfaction with a new but reasonable regulation of the company, the company is liable for the damages resulting therefrom. *Blackstone vs. New York & Erie R. R Co.*, 20 New York, 48; *Weed vs. Panama R. R. Co.*, 17 New York, 362.

And the sudden and wrongful refusal of the railroad's employés to work will not excuse the company for failure to transport freight in the usual time. *Read vs. St. L., K. C. & N. R. R. Co.*, 60 Missouri, 199.

Where a vessel takes a cargo late in the season for transportation around the Lakes, and is laid up by stress of weather, it is her duty to complete the voyage in the spring, if practicable, and carry the cargo to its destination. *Murray vs. Ætna Ins. Co.*, 4 Bissell, 417.—[REPORTER.

JOHN COWLY vs. MONS MONSON.

CIRCUIT COURT—WESTERN DISTRICT OF WISCONSIN—FEBRUARY, 1881.

REAL ESTATE—TITLE BY ADVERSE POSSESSION—TAX TITLE.—A party may gain title to premises by adverse possession by entering into possession under claim of title founded upon a tax deed, fair upon its face, even though it were illegally issued.

QUITCLAIM DEED—COLOR OF TITLE.—A quitclaim deed, if relied upon as conveying a good title, may constitute a good foundation for title by adverse possession.

Wm. B. Jarvis, for plaintiff.

Thomas & Fuller, for defendant.

BUNN, J.—This is an action of ejectment, brought in the Circuit Court for Crawford County, Wisconsin, to recover 80 acres of land, to wit, the S. ½ of N. W. ¼ of section 32, town 11, range 6 West, being in Crawford County. Defense, adverse possession under the statute. The case was removed to this court on application of the plaintiff, and a jury waived by stipulation of the parties.

The plaintiff, to sustain his case, introduced a patent of the land in question from the United States to himself, dated April 16, 1856. The defendant, to sustain his case and show title in himself, introduced a tax deed issued by the county of Crawford to one Peter Elverson, of the land in suit, dated November 9, 1866, and recorded on the same day in the office of the register of deeds for Crawford County; also a quitclaim deed of the land executed by said Peter Elverson, the grantee in the tax deed, to him, Mons Monson, the defendant, dated

November 12, 1866, and recorded September 27, 1869. It also appears from the testimony of the defendant and Elverson that the defendant purchased the land from Elverson at the time the quitclaim deed is dated, November 12, 1866, with the intention of making a farm of it, and paid the sum of $140; in June of the next season (1867) he took actual possession under his deed from Elverson, and broke and grubbed some of the land, and in November of the same year built a house upon the land, and in October of the next season moved in with his family; that since that time he has lived on the land with his family, and fenced it and built a barn, and occupied it as a farm until now, when the improvements are worth $700 or $800; and that he has paid the taxes on the land during his occupancy, and all the while ever since he first entered on the land claimed the exclusive title and right of possession under and by virtue of the tax deed to Elverson and Elverson's deed to him.

The defendant testifies as follows: "I bought the land of Peter Elverson in November, 1866. This is the deed. He gave me this tax deed at that time. I broke four acres in June, 1867. This was on both 40's. I did grubbing on the East 40. I hauled logs that were cut off the land to build a house. I built a house first and then a barn. Have improved between 25 and 30 acres for farming purposes. Am a man of family and live on the land. I moved on the land in October, 1868. Have lived here ever since. I have occupied the land all the time, claiming title, and in good faith believing that I had good title to the land. I had the land surveyed. I was present with the surveyor and helped him survey it. I know the line between the two 40's. The house is on the East 40 and the barn on the West 40."

Elverson testifies to substantially the same facts. Previous to the time that defendant entered on the land under the quitclaim deed from Elverson the land was wild, vacant and

unoccupied. This suit was begun by the service of summons on September 28, 1877.

The plaintiff's counsel makes various objections to the sufficiency of the tax deed: *First*, That the witnessing is not according to law, in this, that the statute form requires the witnessing to be "*done in presence of*," whereas in this deed the form observed is "in presence of," the word "done" being left out. The statute requirement is that the deed shall be substantially in the form prescribed, or other equivalent form. It is quite clear that the deed in this respect, there being two witnesses as the law requires, is sufficient. *Second*, That the acknowledgment is defective. But upon inspection I find the acknowledgment very full and in proper form. *Third*, The amount for which the land was sold, being $9.36, is too much; and the plaintiff's counsel has made a calculation to show that the land was sold for 16 cents too much. Though this, if true, might void the sale, if the defendant was relying on the deed and tax proceedings alone, it is clear the defect does not appear on the face of the deed itself. The plaintiff's counsel insists that there are nineteen instances in which the deed in evidence is defective as compared with the statute form; but, as I am unable to see much force in those defects which have been pointed out, it may be fair to conclude that there is not much more in the other 16 that have not been especially noted, and to which the attention of the court has not been called. I think the deed fair and valid on its face, and sufficient, *prima facie*, to convey a good title to the land.

The plaintiff, further to defend against the defendant's claim, is sworn as a witness and testifies that he paid the tax on the land for the year 1862, for which the sale was made on which the deed was issued; and he introduces a burnt and mutilated receipt, signed by J. P. Perret Gentil, county treasurer of Crawford county, and containing a description of

this land, with other, but no date. About two-thirds, apparently, of the receipt is burned away; but the plaintiff swears it is the receipt for his taxes on this land for 1862. The defendant introduced witnesses who swear that they are acquainted with J. P. Perret Gentil's handwriting, and that in their opinion this is not his genuine signature. Plaintiff's witnesses testify they think it is; so that the evidence in regard to the payment of the taxes for that particular year leaves the question in some doubt. But, from the view I have taken of the case, I do not find it necessary to determine that question. It is claimed by plaintiff's counsel that inasmuch as the statute makes the tax deed of no validity when the taxes have been paid, there can be no adverse possession founded on a tax deed so illegally issued; and if none on the tax deed, then none on the quitclaim to defendant, which it is insisted is only a release or conveyance of no other or greater title than the grantee in the tax deed had. But I cannot accede to this view. The section of the statute under which the defendant claims to have held the land adversely for ten years is as follows: "Where the occupant or those under whom he claims, entered into the possession of any premises under claim of title exclusive of any other right, founding such claim upon some written instrument, as being a conveyance of the premises in question, or upon the judgment of some competent court, and that there has been a continual occupation and possession of the premises included in such instrument or judgment, or some part of such premises, under such claim for ten years, the premises so included shall be deemed to have been held adversely.[1]

The conclusion I have come to is that the defendant makes a case of adverse possession under the statute. He has been in the actual and continued occupancy and possession of the land for ten years and upwards, immediately preceding the

[1] Wisconsin Revised Statutes, 1878, section 4211.

commencement of the action, claiming title in entire good faith under the recorded tax deed, and his conveyance from Elverson, exclusive of any other right. It is not at all necessary that these deeds of themselves should convey a good and perfect title. If that were so, the statute would be of no effect whatever. Color of title is a title apparently good although in fact it may be bad.

If the plaintiff can go back of the tax deed and the conveyance under it to Monson, and show facts *dehors* the record to defeat the deed, then the ten years' occupancy and possession under a written instrument, sufficient on its face to carry a good title, and which may be relied upon in good faith as conveying a title, is of no avail. I do not see any room for doubt that the quitclaim deed itself, if relied upon, as in this case, as conveying a good title, may not constitute a good foundation for color of title and adverse possession.[1] It is sufficient on its face to convey a good title and all the title that could be conveyed by a warranty deed, from which it only differs in that there are no covenants in it.

There is not a particle of evidence, or a circumstance in the case, to throw any doubt upon the actual good faith of the defendant in purchasing, occupying, improving, and paying taxes on the land for over thirteen years, and I think his title by adverse possession good.[2]

Judgment for the defendant.

NOTE.—In order to constitute an adverse possession of land it is not necessary that the title under which the party claims should be a good one, but it must be under color and claim of title exclusive of any other right, and the possession must be adverse and hostile to the one entitled to the possession. *Smith vs. Burtis*, 9 Johnson, 174; *Jackson vs. Ellis*, 13 do., 118; *Jackson vs. Wheat*, 18 do., 40; *Clarke vs. Hughes*, 13 Barbour, 147; *Mosher vs. Yost*, 33 Barbour, 277.

And the fact that the purchaser is afterwards induced to doubt the validity of his title from the sheriff, where he continues in possession

[1] *Northrop vs. Wright*, 7 Hill, 476.

[2] *North vs. Hammer*, 34 Wisconsin, 425.

under the same, will not destroy the adverse character of that possession. *Jackson vs. Newton*, 18 Johnson, 355; *Stevens vs. Brooks*, 24 Wisconsin, 326; *Jones vs. Billstein*, 28 Wisconsin, 221.

Where title is claimed by adverse possession for the statutory period, under a tax title, the possession must have been actual, continued, visible, notorious, distinct and hostile. *Sparrow vs. Hovey*, 44 Michigan, 63.

And to constitute adverse possession there must be not only an actual occupation, but also a claim of title hostile to that of the true owner. *Thompson vs. Felton*, 54 California, 547.

One who enters upon land under a mere agreement to purchase does not hold adversely, as against the vendor, until his agreement has been fully performed, so that he has become entitled to a conveyance. *Clauss vs. Elliott*, 71 Indiana, 302; *Estes vs. Long*, 71 Missouri, 605.

An instrument gives color of title, if by apt words of transfer it passes what purports to be the title, and the grantee's possession thereunder for the statutory period, bars the true owner's right of recovery. *Hall vs. Law*, 102 United States, 461.

The possession of lands under a guardian's conveyance made pursuant to a void decree of the Probate Court, is supported by color of title, and is adverse, and protected by the statute of limitations. *Molton vs. Henderson*, 62 Alabama, 426.

Where the purchaser of land in a tax deed omitted to file with the sheriff a sufficient affidavit, as required by the statute, before taking the tax deed, such deed may nevertheless be claim and color of title. *Whitney vs. Stevens*, 89 Illinois, 53.

A tax deed is sufficient to constitute color of title although no actual title passed thereby. *Coleman vs. Billings*, 89 Illinois, 183.—[Reporter.

NATIONAL BANK OF RISING SUN vs. JOHN C. BRUSH *et al.*

CIRCUIT COURT—DISTRICT OF INDIANA—MARCH, 1881.

PROMISSORY NOTES—INDORSEMENT—CONSIDERATION—EVIDENCE.—An indorser of a promissory note, indorsed in order to perfect an agreement between the maker and the indorsee, may show by parol evidence, as against his indorsee, that he indorsed the note without consideration, and that he was not an accommodation indorser.

Action on Promissory Note. Demurrer to answer.

Baker, Hord & Hendricks, for plaintiff.

Kennedy & Brush and *E. C. Snyder*, for defendants.

GRESHAM, J.—The National Bank of Rising Sun, Indiana, sues John C. Brush, as maker, and William T. Brush, as indorser, of a negotiable promissory note for $8,000, executed May 23, 1877, and payable to the latter 12 months after date. The note contains a clause whereby the maker and indorsers severally waive presentment for payment, protest, and notice of protest and non-payment, and all defenses on the ground of any extension of the time of payment that may be given by the holder to the maker or indorsers.

In the first paragraph of his separate answer, after admitting that he indorsed the note to the plaintiff, William T. Brush avers that the plaintiff agreed to loan to John C. Brush the sum of $8,000, which he was to secure by executing a mortgage upon specified real estate; that the act of Congress under which national banks were organized did not permit them to loan money and secure the same by taking mort-

gages directly to themselves, and for that reason it was agreed between the plaintiff and John C. Brush that the latter should execute to some third person his note for $8,000, and also a mortgage upon specified real estate to secure the payment of the same, which person should indorse the note and thereby transfer the mortgage to the plaintiff; that, pursuant to the agreement, John C. Brush executed to William T. Brush the note in suit, together with a mortgage to secure its payment, and, after the latter had indorsed the note in blank, John C. Brush took the same, and delivered it and the mortgage to the plaintiff, and received the money; and that William T. Brush indorsed the note for no other purpose than to enable the plaintiff and John C. Brush to carry out their agreement.

The second paragraph is the same in substance as the first. There is a demurrer to the first and second paragraphs of the answer. It is insisted, in support of the demurrer, that by his separate answer William T. Brush seeks to contradict or vary his contract of indorsement by parol evidence. The facts stated in the first and second paragraphs of the answer are admitted to be true, and they show that William T. Brush indorsed the note solely for the convenience of the bank and John C. Brush, and without consideration. William T. Brush was the mere instrument of John C. Brush and the bank, to enable the latter to loan its money on mortgage security. It was well understood by all the parties that William T. Brush was not interested in the loan, and that he was not an ordinary accommodation indorser. The money was not loaned on the faith of his signature on the back of the note. He acted as the trustee of the bank, if he held the note and mortgage at all. The act of Congress prohibited national banks from loaning money on mortgage security, and it was supposed that prohibition might be evaded by executing the note and mortgage to William T. Brush, and having him assign the same to the bank. As between the parties to negotiable paper and

others having notice, the want of consideration may be shown. This is not a suit between an innocent holder of the note for value and the indorser. The indorser should be allowed to prove the facts stated in his answer, if he can, not to contradict or vary the terms of the contract of assignment, but to show that he became a party to the paper without any consideration whatever.[1] Having thus induced William T. Brush to indorse the note, it would be upholding a fraud to allow the bank to hold him liable as an indorser.

Demurrer overruled.

[1] *Benton vs. Martin*, 52 New York, 570; *Ross vs. Espy*, 66 Pennsylvania State, 481.

UNION MUTUAL LIFE INSURANCE COMPANY vs. THE UNIVERSITY OF CHICAGO *et al.*

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—MARCH, 1881.

IN EQUITY.

1. CONFLICT OF JURISDICTION—SERVICE OF PROCESS—FORECLOSURE OF MORTGAGE.—A bill was filed in the State Court to enjoin the foreclosure of a mortgage, and to have it set aside and declared void. Later, but on the same day, a bill was filed in the United States Circuit Court to foreclose the mortgage. The process from the United States Court was first served: *Held*, that the fact that the process of the United States Court was first served, gave that court jurisdiction to go on with the foreclosure suit and determine all questions as to the validity of the mortgage.

2. POWER OF FEDERAL COURT TO RESTRAIN PROCEEDINGS IN STATE COURT.—*It seems*, that in such a case the United States Court has the power to prevent any of the parties before it from proceeding in the State Court suit and raising the question there whether the mortgagor had the right to execute the mortgage and whether he would be estopped by the decree in the former court.

Leonard Swett, E. R. Bliss, and J. L. High, for complainant.

Charles A. Gregory, for University of Chicago.

Decker, Douglas & Kistler, for Douglas heirs.

DRUMMOND, J.—In 1856 Stephen A. Douglas was the owner of a tract of land in the south part of the city of Chicago, which he proposed to convey to certain parties or to a corporation for an institution of learning. A contract was made between him and Dr. J. C. Burroughs, who represented the institu-

tion, on the 2d day of April, 1856. This conveyance was to be made on certain conditions which were expressed in the contract, among which were that there should be a building erected on the property, and that a certain amount of money should be contributed. On November 10th, 1856, it appears that Dr. Burroughs ascertained that he was not able to comply with the conditions of the grant, and accordingly application was made to Mr. Douglas for the purpose of obtaining an extension of time, during which certain things were to be done; for instance, the laying of the foundation of the University, and accordingly Mr. Douglas then made a memorandum by which he extended the time for laying the foundation of the University until the first day of May, and for expending the sum of $25,000, until the first day of October, 1857. All the other conditions annexed to the grant were to remain in full force. This clause terminated the memorandum of agreement which was at that time made: "This extension of time is granted on the condition and with the understanding that the title of said land shall forever remain in said University, for the purposes expressed in said agreement, and that no part of the same shall be ever sold or alienated, or used for any other purpose whatever." Dr. Burroughs transferred all interest that he had in this contract and memorandum, to the trustees of the University of Chicago; and on the 30th day of January, 1857, the legislature of this state passed an act incorporating the University, and on August 13th, 1858, Mr. Douglas conveyed the land which was the subject of the contract between him and Dr. Burroughs, to the board of trustees of the University of Chicago, absolutely. There was no condition or qualification named in the deed such as was contained in the articles of agreement made between him and Dr. Burroughs. The Chicago University took possession of the property; a build-

ing has been constructed upon it, and the institution has been carried on with more or less success ever since.

February 8th, 1876, the University executed a mortgage or deed of trust to the plaintiff in this case, the Union Mutual Life Insurance Company, to secure the sum of $150,000. These are all the facts necessary to mention before referring to what has taken place in the courts.

On the 18th of February last a bill was filed in the Circuit Court of Cook County by Mr. Mills, the State's attorney of the county, who appeared on behalf of the State, by Carter H. Harrison, mayor of the city, and *ex-officio* one of the regents of the University, and by Isaac N. Arnold, also a regent of the University, for the purpose of declaring that the mortgage or deed of trust which was executed by the board of trustees to the plaintiff in this case was inoperative, on the ground, I infer, of the clause contained in the memorandum of Mr. Douglas of November 10th, 1856, which has already been referred to. The prayer of the bill is that Levi D. Boone, the trustee in the deed which was executed by the board of trustees for the benefit of the plaintiff in this case, the University of Chicago, and John C. Burroughs, and the board of regents, who are made parties defendant, may be required to make full and direct answer to the same, etc. The bill asks that Boone and the Mutual Life Insurance Company may be perpetually restrained from attempting to foreclose the mortgage and that the said trust deed or mortgage may be set aside and declared void as against the said University of Chicago, as a cloud on its title, and that the said deed may be delivered up to be cancelled.

On the same day, the 18th day of February last, the Union Mutual Life Insurance Company filed a bill in this court to foreclose the mortgage or deed of trust, claiming that default had occurred in the payment of the interest, and that the principal and interest were due, and that they had a right to

foreclose the mortgage; claiming also that the University had failed to perform many of its contracts about keeping the property insured, etc. That bill contains this clause: "And your orator further charges that the said defendant, the University of Chicago, through its officers and agents has conspired or is conspiring with divers persons, to your orator unknown, to defeat your orator's recovery of its said claim as hereinbefore stated, by denying that it, the said defendant, the University of Chicago, had authority to execute said trust deed and to convey said premises, as in the manner herein set forth."

The defendants to this bill are the University of Chicago, a corporation created under the laws of this state, N. K. Fairbank, president, and O. W. Barrett, secretary of the board of trustees; Levi D. Boone, and Samuel S. Boone, the one as the trustee of the mortgage or deed of trust, and the other as the successor of the trustee. As I have said, the bills were filed on the same day, the one in the Circuit Court of Cook County, and the other in this court. It seems that the bill in the State Court was filed before the bill in this court, although on the same day. No process of either court was served on the day the bill was filed. On the 19th of February, the day following, the process of this court was served on all the defendants before eleven o'clock A. M. of that day. The process issuing from the State Court was not served until after two o'clock P. M. of the same day; so that the process issuing from this court was first served; and the question is, whether this court obtained jurisdiction of the case for the purpose contemplated by the bill, viz.: the foreclosure of the mortgage. Although the bill was filed in the State Court first, on the same day, the rule, I take it, is well settled that the right of a court to take jurisdiction of a party depends upon the service of process upon him. If a person commence a suit, and process is

not served, it does not take effect as against the defendant, howsoever long process may remain in the hands of the officer. The process of this court being first served upon the defendants, the University of Chicago and Boone, gave this court jurisdiction, and the right to go on and foreclose this mortgage. It is said, and there is some evidence in an affidavit tending to establish the fact, that there was a race on the part of the plaintiff in the case in this court, first to obtain service upon the defendants. It may be, but at the same time, this court must look at the facts. It is often a question which has been most diligent, and courts have to determine rights according to the diligence of a party. And if, in this case, the plaintiff has been more diligent than the plaintiff in the State Court, how can this court deprive it of its equity, and the preference to which it may be entitled? I do not know of any way that this can be done. Then this court will retain this bill for the purpose named in it—for the foreclosure of the deed of trust or mortgage—and the question is, what is the effect of that? After these two bills were filed, the plaintiff in this court came into court, and, on the 12th instant, filed a supplemental bill alleging the facts of the litigation in the State Court; that a bill was there filed for the purpose named, and giving a copy of the bill; also alleging that Stephen A. and Robert M. Douglas, heirs at law of Mr. Douglas, the donor of this land to the University, had interposed in the State Court and become defendants, and filed a cross-bill for the protection of any equities they may have, on the ground, as I understand, that in consequence of the failure on the part of the Chicago University to perform an alleged trust, the property has reverted to the heirs of the donor.

It is undoubtedly a very embarrassing state of litigation, there being two suits, brought in two jurisdictions, involving to a great extent the same subject-matter, and I have felt

some difficulty in determining what is the true rule upon this subject, but I have come to the conclusion that it must be this: That this court has a right to go on, as I have already said, and decide all questions which legitimately flow out of the subject-matter of controversy in this case, namely, those affecting the existence of the mortgage and the right of the University of Chicago to make it, so as to reach a decree, if the case warrants it, which shall be conclusive upon the University of Chicago; that is to say, which shall prevent that corporation from ever setting up any claim or right to this property, or any claim whatever that it had not the right to execute this mortgage. That is as far as I think it is necessary, and to that extent I think it is the duty of the court, to go. In this case is involved the fact of the making of the mortgage, the right of the University of Chicago to execute it, and the right of the court to make a decree which shall foreclose all the equities of the University of Chicago. In one sense it is true that a proceeding by foreclosure does not necessarily involve the absolute or indefeasible title to the land. The object is to foreclose whatever equity the mortgagor may have in the land. It may happen that there is a paramount title in a third party which need not be decided upon the bill of foreclosure, but the question does arise as to the right of the mortgagor to execute the mortgage, and whether or not he should be foreclosed and forever barred from setting up any claim to the land covered by the mortgage.

Now, I think I may say to the counsel, that there ought not to be two litigations upon the questions to which the court has adverted; that is to say, in two different courts. I admit that it is quite possible that the court may go on in this case and make a decree forever barring the equities of the University of Chicago, and preventing it from ever setting up any claim to this land, and placing this plaintiff, so far as the University of Chicago is concerned, in possession; but still

there may be a right outside of that, existing in a third party which would not be interfered with by this decree. I do not desire, if it can be avoided, to issue an injunction in this case, even if I have the right to do so. I have stated these views upon the questions of law involved, and I leave it to the counsel to determine whether it shall become necessary for the court to take any positive action.

I think it may be the right and duty of the court, if it shall become necessary, to prevent any parties in the State Court litigation who are also parties here, from going on and raising the question there whether or not the University of Chicago had the right to execute this mortgage, and whether it is to be estopped by the decree of this court; for these are questions which I think this court has the exclusive right to determine, the court having jurisdiction of the parties and of the subject-matter, and I think the decision of the court would be, as to the University of Chicago, binding in all courts. I leave the matter, therefore, without any order being made at this time, for the consideration of counsel.

NOTE.—In a similar case before Mr. Justice McLean, *Bell vs. Ohio Life & Trust Co.*, Vol. 1. of this series, page 260, he held that priority of jurisdiction is determined by the service of process, not by the date of the commencement of the suit.

Lis pendens does not exist, in respect of a suit in chancery, until a summons or subpœna has been duly and regularly served upon the defendants, and bill also filed. *Grant vs. Bennett*, 96 Illinois, 518.

Where concurrent jurisdiction may be exercised by the Federal and State Courts, the court which first obtains jurisdiction, cannot be interfered with by any other. *Ex parte Robinson*, 6 McLean, 355; *Smith vs. McIver*, 9 Wheaton, 532; *Mallett vs. Dexter*, 1 Curtis, 178; *The Robert Fulton*, 1 Pennsylvania, 620; *Foreign Missions vs. McMaster*, 4 American Law Register, 526; *Greenwood vs. Rector*, Hempstead, 708; *Ex parte Sifford*, 5 American Law Register, 659; *Shelby vs. Bacon*, 10 Howard, 56; *Green's Adm'x vs. Creighton*, 23 Howard, 90.

And the court which first obtains jurisdiction exercises it to the exclusion of all others. *Parsons vs. Lyman*, 5 Blatchford, 170; *Crane vs. McCoy*, 1 Bond, 422; *Barton vs. Keyes*, 1 Flippin, 61.

In cases of concurrent jurisdiction in the State and Federal Courts,

the latter have no discretion to refuse jurisdiction in order to prevent a collision of authority. *Wadleigh vs. Veazie*, 3 Sumner, 165.

A question which is pending in one court of competent jurisdiction, cannot be raised and agitated in another by adding a new party and raising a new question as to him, along with the old one as to the former party. *Memphis vs. Dean*, 8 Wallace, 64.

The state tribunals cannot by injunction or otherwise interfere in any way with the appropriate process of the Federal Courts for the collection of their judgments. *United States vs. Lee County*, 9 Internal Revenue Record, 25.

Where executions issue from a State Court, and from a Federal Court, if there be no lien by judgment, the one under which the first seizure is made must prevail. *Brown vs. Clark*, 4 Howard, 4; *Pulliam vs. Osborne*, 17 Howard, 471.

Where a marshal and a sheriff have each process of execution against the same defendant, the proceeds of his goods will be treated as if but one jurisdiction existed; and after satisfying the execution under which the sale took place, the surplus will be awarded to the plaintiff in the other writ. *Bayard vs. Bayard*, 5 Pennsylvania Law Journal, 160; *Azcarati vs. Fitzsimmons*, 3 Wallace's Circuit Court Reports, 184.—[Reporter.

WILLETT S. MAIN, Assignee vs. NELSON BROMLEY *et al.*

Circuit Court—Western District of Wisconsin—March, 1881.

In Equity.

Bankruptcy—Right of Assignee to enjoin Action in State Court.—An assignee in bankruptcy cannot maintain a suit to set aside a void sale of his property by the bankrupt, and to enjoin the purchaser from prosecuting an action of trespass in the State Court against attaching creditors of the bankrupt, for seizing the goods sold, where the property has already come into the possession of the assignee and he is not a party to the proceedings in the State Court.

Bill to set aside sale and for injunction.

Finches, Lynde & Miller, for complainant.

F. J. Lamb, for defendants.

Bunn, J.—This is a suit in equity, brought to have a certain sale of goods by the bankrupt to defendant Bromley, had a few days previous to the filing of the petition in bankruptcy, declared void and set aside, and to enjoin the defendant Bromley from prosecuting a suit in the State Court against the other defendants, Bacon, Goodrich & Johnson, to recover damages for taking the goods from Bromley on attachment against the bankrupt, issued from a justice court after the sale to Bromley and before the proceedings in bankruptcy were begun. The bankrupt, Giles, was a small merchant, doing business in Jefferson county, and on the seventeenth of April, 1875, being indebted to Bromley in the sum

of $400, upon a promissory note given for borrowed money, and being unable to pay in cash, executed a bill of sale of the remnant of his stock of groceries to pay the note, representing at the time that it was all he had to pay with, and that he did not owe any other debts. Bromley did not want the goods, but the evidence shows bought them in entire good faith as the only means of getting his debt. A few days after, on April 28th, Bromley having possession of the goods under the bill of sale, the other defendants, Bacon, Goodrich & Johnson, wholesale merchants in Milwaukee, caused an attachment to be issued in justice court against Giles, afterwards the bankrupt, upon a claim of $169.15, and attached the goods in the hands of Bromley, the deputy sheriff seizing them and taking them into his possession on the attachment as the property of Giles. Thereupon Bromley commenced an action of trespass against Bacon, Goodrich & Johnson, and one Hutchinson, the deputy sheriff, in the Circuit Court of Jefferson county, to recover damages for seizing the goods and taking them from Bromley under the attachment.

On May 1st immediately following, Giles filed a voluntary petition in bankruptcy and was adjudged a bankrupt. Thereupon, upon the affidavit and application of Bacon, Goodrich & Johnson, who still held the goods under the attachment, this court issued a general warrant to the marshal, as messenger, to seize all the goods and property of the bankrupt, and these goods were voluntarily turned over to the marshal, by the deputy sheriff, under the direction of Bacon, Goodrich & Johnson, as the goods of the bankrupt.

Bromley's action for trespass came on to trial in the Circuit Court of Jefferson county, and the jury, under instructions of the court, found a verdict of nominal damages, merely, for the plaintiff, on the ground that though the sale to Bromley was a valid sale under the state law, yet it was void

under the bankrupt law, and that under that law Bromley had no title to the goods and therefore could only recover nominal damages.

The case was appealed to the Supreme Court, and reversed, in *Bromley vs. Goodrich*, 40 Wisconsin 131, the court holding that the State Court should not take jurisdiction to adjudicate a sale that is valid under the state law to be void under the provisions of the bankrupt law, in the absence of any adjudication on the point by the Federal Court; and that this sale to Bromley being a valid and *bona fide* sale under the state law, the court should have held it so, and allowed the plaintiff to recover in that suit the value of the property taken. The case was thereupon sent back to the circuit court of Jefferson county for a new trial. This suit is brought here to stay the trespass case in the State Court, and the questions presented are whether or not this court has jurisdiction to stay the suit, and whether the bill and the proofs show any equity on the part of the assignee.

The suit sought to be stayed is between certain creditors of the bankrupt, and relates to property that has since come into the possession of the assignee as his representative, and I am satisfied, from the testimony, that though Bromley purchased the goods in entire good faith and for a full consideration paid, yet the transfer was invalid under the provisions of the bankrupt law, and that the goods were properly turned over to the marshal, as messenger, and by him to the assignee; and if these facts constitute a sufficient ground on which to maintain the suit, then the plaintiff is entitled to the relief sought.

But without questioning the jurisdiction of the court in a proper case to stay proceedings in a State Court where the assignee is a party, or where his rights as assignee are in any way to be affected by the litigation, I cannot see that in this case the plaintiff has any sufficient ground in equity to stand

upon. He is not sued. He is in no sense a party to the litigation. The fund he represents is in no danger. His rights as assignee to the property are in no way being menaced or questioned. The little property there was, was voluntarily turned over to the marshal. About one half the goods, or $200 in value, was set off to the bankrupt by the assignee as exempt under the laws of Wisconsin, and approved by order of the court. The rest of them have been sold by the assignee and turned into money, the avails, about $206, being now in the hands of the assignee, ready to be distributed.

Under these circumstances, there would seem to be no sufficient reason for setting aside the sale to Bromley, or staying proceedings in the State Court.

If anything was to be gained by it to the assignee, and so to the creditors generally, then the suit would be proper, then would there be a reason for its existence. Or if the property was still held by Bromley, and a suit was necessary to recover it, there would then exist a good reason for bringing the suit to set the sale aside and recover the property; so if the assignee were sued in the State Court for taking the property. But aside from such motive of benefit or interest to the assignee, as the representative of all the creditors, it is difficult to see what ground the assignee has to stand upon to maintain a suit to set aside a sale held valid under the state law, and to stay litigation between two creditors of the bankrupt. The suits which the assignee can maintain should be for the benefit of the creditors generally, and not in the interest of a particular creditor only.

The assignee may safely look on and see litigation go on between certain creditors, so long as he is in no way a party to it, and cannot be bound or in any way affected by the results of such litigation. It is time enough for him to act when his rights as assignee are menaced, or it is necessary to institute litigation to have those rights protected or ascertained.

In this case he has confessedly all the property the bankrupt had, and is in no danger of losing it. There is, therefore, no sufficient motive for the suit. The bare fact that the sale was void is no reason for setting it aside, so long as the assignee has the property, and all that he could obtain in any event by the most successful litigation.

The bill is dismissed.

FARMERS' LOAN AND TRUST COMPANY vs. THE GREEN BAY & MINNESOTA R. R. CO.

CIRCUIT COURT—EASTERN DISTRICT OF WISCONSIN—MARCH, 1881.

IN EQUITY.

1. FORECLOSURE OF RAILROAD MORTGAGE—SALE—PAYMENT WITH BONDS—PROVISIONS IN MORTGAGE.—Provisions in a railroad mortgage, that in case the trustee should sell the mortgaged property upon default of payment, the mortgage bonds should be received, at a rate to be fixed in a certain manner, as part of the purchase price, do not bind the court, if foreclosure proceedings are instituted and a sale is made under its direction.

2. VALUE OF BONDS RECEIVED IN PAYMENT—WHEN FIXED.—Where in the foreclosure of a railroad mortgage the court decrees that at the sale the mortgage bonds may be received in part payment of the purchase price, it is not necessary nor customary to fix the value of such bonds, prior to the confirmation of the sale.

3. CONTROVERSY AS TO TITLE—BILL OF REVIEW.—The fact that the receiver of the railroad has filed a bill to set aside certain deeds of lands which he claims belongs to the railroad, and about which there is a controversy, is no ground for allowing a bill of review, upon petition of one

of the bondholders, for the purpose of setting aside the decree for the sale of the road. The title to such lands cannot be determined in the foreclosure proceedings.

4. SERVICE OF PROCESS.—It cannot concern bondholders how service of process on a railroad company is obtained in a foreclosure suit, provided the court legitimately obtains jurisdiction of the parties and the indebtedness is not questioned.

5. LACHES in filing petition for leave to file a bill of review, considered.

Petition of Mary M. Kelly for leave to file a Bill of Review.

Finches, Lynde & Miller, for petitioner.

E. C. & W. C. Larned, contra.

DYER, J.—On the 23d day of January, 1878, the complainant in the above entitled cause, as trustee for bondholders, filed a bill in this Court to foreclose two mortgages on the railroad and property of the defendant company, given to secure the payment of certain issues of bonds, amounting in the aggregate to $5,300,000. On the 3d day of April, 1879, a decree of foreclosure and sale of the mortgaged property was entered. On the 10th day of January, 1881, and but a few days before the sale under the decree of foreclosure was advertised to take place, Mary M. Kelly, a holder of bonds secured by one of the mortgages, filed a petition in said cause praying leave to file a bill of review for certain alleged errors and irregularities in the foreclosure proceedings; and the question has been raised by demurrer to the petition, whether or not leave to file such a bill should be granted. The determination of petitioner's right to file a bill of review involves therefore a consideration of the contents of the petition in connection with such parts of the record in the foreclosure case as are brought into controversy by the allegations of the petition.

As appears by the foreclosure decree, the original issue of

bonds secured by the first mortgage was $3,200,000, and the issue of bonds secured by the second mortgage was $2,100,000.

The petitioner alleges herself to be the holder of second mortgage bonds amounting to $14,320, besides interest. The decree adjudges, that

"Of the said second mortgage bonds the sum of $850,260, was issued in exchange for interest coupons due upon said first mortgage bonds, and is, with the interest due thereon, a lien under the said mortgage and constitutes a part of the debt secured thereby;" and by the decree it is further adjudged and decreed, "that the entire amount of bonds secured by the said first mortgage, is the sum of $4,050,260, being the amount of first mortgage bonds of $3,200,000, * * * and the said amount of $850,260, of second mortgage bonds issued as security for interest due on said first mortgage bonds. * * * That the entire amount of bonds outstanding and unpaid secured by the said second mortgage * * * is the sum of $2,100,000, of which amount the sum of $850,260 was issued to secure past due interest coupons on said first mortgage."

Further provisions of the decree important to notice are, that any of the bondholders may become purchasers of the mortgaged property at the foreclosure sale; that the sum of $25,000 shall be paid in cash at the time of sale, and that the purchaser shall comply with his bid on the day of sale; that

"After the payment to the marshal of the sum of $25,000 in cash, of the sum bid by the purchaser at said sale, the marshal may receive from said purchaser for the balance of the sum bid at such sale, in lieu of cash, any of the outstanding and unpaid bonds or coupons secured by the said first mortgage, at such percentage of the face value thereof as this court shall at the approval of said sale authorize and direct." Also, "that so much of the purchase money at said sale as shall be necessary to pay the costs of this suit as taxed, and the costs and expenses of said sale and the amount hereby adjudged to be due to the said complainant and its solicitors, shall be paid in cash, and that the remainder of said purchase money may be paid in cash or in said first mortgage bonds, or such of said second mortgage bonds as are by this decree held to be secured by said first mortgage in the proportion aforesaid."

1. It is claimed by the petitioner that in various particulars set forth in her petition, error and ambiguity are appar-

ent in the decree; and one of the allegations upon which this claim is founded is, that

"It appears on the face of the decree that a cash bid of $25,000, is not sufficient to make valid and effectual the terms of the decree, in this, that the said decree provides on its face that $850,260, of the second mortgage bonds given in exchange for first mortgage coupons, with the interest thereon, shall be a first lien and charge upon all the property real and personal, by said first mortgage conveyed, and to satisfy said $850,260, as a first lien, a sum of over $25,000 in money should and ought to be directed to be paid."

The objection to the decree is, I think, founded upon a misapprehension of its scope and meaning. The decree does not give to the $850,260, a rank in advance of the first mortgage bonds. It declares that second mortgage bonds of that amount were issued in exchange for interest coupons due upon the first mortgage bonds, and are, with interest, a lien under the first mortgage and entitled to be proved under that mortgage, and constitute a part of the debt secured thereby. Again, in another part of the decree it is declared that "the sum of $850,260 was issued to secure past due interest coupons on said first mortgage, and is secured by said first mortgage, as aforesaid;" and as we have already seen, it is further provided that the purchase money on the bid "may be paid in cash or in said first mortgage bonds or such of said second mortgage bonds as are by this decree held to be secured by said mortgage." It is clear, therefore, that the second mortgage bonds to the amount of $850,260, are simply placed on the same footing as the first mortgage bonds, not as having a preference over the latter, but as being equally secured under the first mortgage with the first mortgage bonds. There was, therefore, no greater or other reason why the decree should provide for a cash payment on the bid of a purchaser sufficient to cover the $850,260, than there was for a cash payment adequate to cover the entire amount of the first mortgage bonds.

2. The mortgages provided that in case of default in pay-

ment of either the principal or interest due on the bonds secured thereby, and on written request of the holders of a specified proportion of the bonds, the trustee might sell the mortgaged property; and it was therein further provided that:

"The amount of the bid or purchase money of said sale may be paid and satisfied in whole or in part by the outstanding mortgage bonds, or any of them, issued hereunder, and the same shall be taken and received in whole or in part payment and satisfaction by the party of the second part, its successor or successors, according to their value, to be ascertained and determined by the net amount arising from such sale, as compared with the amount of outstanding bonds issued hereunder as aforesaid."

The decree, as we have before observed, provides that after payment of $25,000 in cash of the sum bid at the sale under the decree, the purchaser may pay the balance of his bid in outstanding bonds and coupons secured by the first mortgage, "at such percentage of the face value thereof, as the court shall, at the approval of said sale authorize and direct."

Now it is alleged in the petition that the decree is erroneous in that it does not observe or follow the terms of the mortgages as to the receipt of bonds as part of the purchase price of the property sold.

The sale authorized in the mortgage was one to be made in certain contingencies, by the trustee. It was a sale to be made in accordance with the stipulations of the parties. The course of procedure there prescribed was one to be pursued in case of a sale without foreclosure, and it was competent and proper for the parties to place upon the trustee certain restrictions, and to define the limits within which he must act in making such a sale. But those provisions could not bind the court if foreclosure proceedings should be instituted and a sale should be made under its direction. In such case the sale would have to be made according to the usual course of practice in judicial proceedings, and the court would be no

more bound to adopt the provisions of the mortgages as to the acceptance from a purchaser, of bonds to apply on his bid, or the proportion in which bonds should be so received, or the manner in which their value should be ascertained, than it would be to adopt the directions to the trustees contained in the mortgages as to the advertisement of the property for sale. As a test of this question, suppose the court, ignoring the provisions of the mortgages altogether, had ordered the property sold for cash, and in no manner authorized the payment of a bid in bonds, would that be an error of which a bondholder could complain? Clearly not. Undoubtedly the court might adopt, so far as practicable, the method of procedure pointed out in the mortgages, but it would not be error affecting the validity of the decree, not to do so, unless wrong and injustice were apparent in the decree, and I am unable to perceive wherein the decree in the particular under consideration fails to recognize the rights of all parties.

3. This brings us to another point urged against the validity of the decree, and which in some aspects connects itself with the question last considered. It is alleged in the petition as one of the grounds on which the court should allow a bill of review to be filed, that the decree fixes no value to the bonds or coupons secured by either of the mortgages; that in order to secure just and equitable bidding at the sale, the value of the bonds should be ascertained by proof on reference to a master before the sale, and that without such previous ascertainment of value, no bidder can know what amount of bonds or coupons he can pay on his bid. In the first place, it may be remarked that the provision in question in this decree, is similar to that inserted in railroad mortgage foreclosure decrees in this circuit, as I am advised by the Circuit Judge, whom, for certainty of information, I have consulted on the point. Obviously the value of the bonds and coupons must depend on the value of the mortgaged

property, and that value is best ascertainable by sale of the property. I do not see, therefore, how it would be possible, or at least practicable, to determine the value of the bonds, or to determine what percentage of value should be applied on the bid, before the sale transpires. There may be prior liens to be paid in the shape of intervening claims, and I cannot perceive how a proper and effectual sale can be made—if bonds are to be applied on the bid—unless the court is permitted to fix the rate, after the sale is reported, at which bonds shall be received. And it seems to me, that an attempted ascertainment of value of bonds, before the sale, for the purpose of fixing the rate at which they may be applied on the bid, would be more likely to involve injustice—especially to small holders—than an ascertainment made subsequently, because before sale, the only value susceptible of proof might be one merely nominal, while after the sale, the value would be actually represented by a realized price.

In this connection it is urged that the decree does not determine what amount of bonds may be taken to apply on the bid.

Whether it can be said in strictness of definition, that the sale authorized by the decree is a cash sale, or not, I think it is equivalent to that. The decree provides that $25,000, in cash shall be paid by the bidder, at the time of the sale; that after such payment the *balance* of the bid *may be* paid in bonds and coupons, or, as it is expressed in another part of the decree, after the payment of costs and expenses, etc., the remainder of the purchase money may be paid in cash or in certain designated mortgage bonds. Certainly the court would have the power to require the entire amount of the bid to be paid into court in cash, and then to apply the money in payment of costs and upon the bonds at such a percentage as the entire bid would pay. In that case the court would receive the money and directly pay it out again in dividends

on the bonds. In the case contemplated by the decree, the bonds are brought in as representing a part of the cash bid, and suitable indorsements and cancellations made, so that the transaction is made equivalent to the payment in cash of the entire purchase money, and the application of it on the bonds in manner before indicated. Could the court have foreseen what has occurred since the entry of the decree, especially in regard to the presentation of intervening claims, it is probable that it would have required in terms the payment of a larger sum in cash at the time of the sale, than $25,000; but I do not think that very important, because the court has the undoubted power to require a sufficient sum to meet all exigencies to be paid into court as a condition of confirming the sale. After much consideration of the subject, I am unable to perceive how injustice could result to bondholders from the terms of this decree in the particulars under consideration. Every bondholder or other person is at liberty to bid at the sale. He may bid what he thinks the property is worth. He knows that the price for which the property may be sold will represent its value and will fix the value of the bonds. He knows that the proceeds of the sale must be used to pay bonds, and that they must be applied *pro rata* upon bonds. He knows also that the percentage so to be applied, will depend upon the amount for which the property sells and the amount of the bonds, and knowing further that if the sale is properly conducted and if he is the highest bidder, he will get the property, he is left to freely and fairly exercise his judgment as to the sum he will bid. On the whole, my opinion is, that the decree is not erroneous and does not in form or substance deviate from correct practice, in the particulars which have been considered.

4. The petition alleges that the receiver in the foreclosure action has filed a bill in this court against D. M. Kelly and

others, to set aside certain deeds of depot grounds, right of way, and other lands, which it is claimed by the receiver belong to the railroad company, and which it is claimed by the defendants in said bill belong to them; that the right of the company to said property should be adjudicated in the foreclosure suit, and that the title deeds thereof were of record before the bill in foreclosure action was filed; and it is further alleged in the petition, that the said D. M. Kelly and others, who are defendants in the action brought by the receiver to settle the title of the lands in controversy in that action, were necessary parties in the foreclosure suit, and that without their presence in that suit their legal or equitable rights to the lands, cannot be cut off by the foreclosure decree and a perfect title thereto given to the bidder at the foreclosure sale.

I am unable to see how the rights of the petitioner are injuriously affected by the facts thus alleged. It is apparent from the allegations she makes, that D. M. Kelly and others are claiming the lands in question as their own, under a title adverse to the railroad company. If they succeed in the litigation with the receiver they will hold the lands. If they fail, then the lands will fall into the general mass of property covered by the mortgages, and the title will pass to the purchaser at the foreclosure sale. Such a question of adverse title could not be litigated in the foreclosure suit. And moreover, the petitioner, in my opinion, divests herself of all right to make this objection to the decree and the foreclosure proceedings, because in connection with her allegations on the subject, she denies that the lands in question are the property of the railroad company, and of course thereby inferentially affirms the right and title to the lands claimed by the defendants in the action brought by the receiver.

5. But it is charged in the present petition, that the action to foreclose the mortgages in suit was fraudulently and col-

lusively brought. And in considering this phase of the case, it is necessary to take notice of the allegations of the petition. Those allegations stated in condensed form, are, that certain bondholders, including John I. Blair and William E. Dodge, caused the foreclosure bill to be filed; that to carry out certain schemes for getting control of the mortgaged property and to obtain unjust and improper advantage over petitioner and other bondholders and stockholders; that Blair and Dodge retained J. P. C. Cottrill, Esq., as attorney for the railway company; that Mr. Cottrill had never before acted as the general attorney of the company, and that immediately after retaining him, Blair and Dodge caused the bill in the foreclosure action to be filed, and a subpœna to be issued and served upon said Cottrill as attorney of the company. That the only service which Mr. Cottrill or his firm thereafter rendered in the case, was to file an answer which had been previously prepared by the counsel for Blair and Dodge and their party of bondholders.

It is alleged that neither Mr. Cottrill nor his firm had any personal knowledge of the facts stated in the foreclosure bill or in the answer thereto, and that they had nothing to do with the drafting of the answer, and were not consulted or advised with about the subject-matter thereof. It is charged that at the time the said Cottrill was so appointed attorney of the defendant company, William E. Dodge was the president of the company, and that upon his appointment as such attorney, Mr. Cottrill went with the solicitor of the complainant, The Farmers' Loan and Trust Company, before the judge of this court, and consented to the appointment of a receiver in the foreclosure suit; that at the time of his appointment as attorney for the company, said Cottrill was shown by one of the solicitors for the complainant a letter from Dodge appointing him such attorney, and that he acted under such letter of appointment; that the appointment of

said Cottrill was obtained by Blair and Dodge, and those in interest with them, for the fraudulent purpose of obtaining a fraudulent and collusive service of process in the foreclosure suit, and not with *bona fide* intent to make him the general attorney of the company to defend the interests of the company. It is then charged generally that the appointment of said Cottrill as attorney for the purpose of serving process of subpœna upon him, was fraudulent as to the stockholders and other bondholders of the company not parties thereto, and was made by Blair and Dodge and their associates for the fraudulent and collusive purpose of obtaining service of the subpœna in the foreclosure suit. And so, it is further alleged, that such service was fraudulent and collusive, and was a fraud on the court, and upon all stockholders and bondholders who did not know or assent to the same, and should therefore be set aside, with all proceedings in the foreclosure suit subsequent to the issuing of the subpœna. It is then stated that the complainant, the Farmers' Loan and Trust Company, had knowledge of, and colluded with Blair and Dodge in the matter of the appointment of said Cottrill as attorney for the company, and in the service of process on him, and that the petitioner had no knowledge of any of these alleged facts until the 7th day of January, 1881.

Many of these allegations are made on information and belief; but admitting them all to be true, the question is at once suggested, Wherein consists the fraud upon the petitioner, and how is she injured by the matters complained of? She cannot be heard in behalf of stockholders, for they are not here complaining. She cannot be heard in behalf of other bondholders, for they must speak for themselves if they have been wronged. The only question is, Wherein has the petitioner been injured or defrauded by the proceedings mentioned? This was not the case of a fictitious action without a genuine subject-matter to support it. Here were large

mortgages given to secure bonds, the interest on which was unpaid. The genuineness of these instruments and the validity of the debt they represented and secured are not questioned. By the allegations of the bill in the foreclosure suit which is part of the record, it appears that the holders and owners of bonds amounting to more than one half of the entire issue under each of the mortgages, requested the trustee to institute foreclosure proceedings. This is not denied in the present petition, and, if true, it was the duty of the trustee to file the bill in behalf of all the bondholders. It could not concern bondholders how service of process on the company was obtained, provided the court legitimately obtained jurisdiction of the parties. And why should not the mortgages be foreclosed, provided a reasonable proportion of the holders of bonds requested it to be done? Certainly the petitioner cannot be heard to say that it was the duty of the company to resist and obstruct a foreclosure. If the mortgages were valid, and the debt due, and if the company could not make payment, the contrary of which the petition does not allege, then it was the duty of the company to permit the trustee to foreclose, and the bondholders to realize their money. Nor upon such a state of facts does it seem to me that it would be a fraud upon bondholders if the president of the company were to employ counsel to act for the company, even in advancement of the foreclosure. The gist of the petitioner's allegations is, that certain bondholders, one of whom was president of the company, retained counsel for the company, for the purpose of procuring service of process of subpœna, and upon whom such service might be made, in a genuine action to foreclose valid mortgages given to secure a just debt. Stockholders being silent, I am unable to perceive how the petitioner can maintain that the proceeding complained of was a fraud upon her or a fraud upon the court. There are allegations to the effect that the object of Blair and Dodge and

their associates was to obtain ultimate control of the mortgaged property. But the proceedings to foreclose the mortgage were necessarily public. The sale following the decree must likewise be public and open to all bidders. Confirmation of the sale by the court, must of necessity, also be open to the resistance of any party in interest, if the sale should not be fairly conducted, or if there should be such inadequacy of price as involved a sacrifice of the property, or injury to parties interested.

Considering this matter in all the points of view suggested, the manifest infirmity in the petitioner's case upon this branch of it, is, that she shows no fraud upon her and no injury to her.

Attention was called on the argument to certain admissions contained in the answer of the company filed by Cottrill & Cary in the foreclosure suit, as prejudicial to the rights and interests of the petitioner. But it is not perceived how they could operate to her injury, and moreover the truthfulness of those admissions is nowhere denied or questioned in the present petition.

I have examined with care the cases cited by petitioner's counsel: *Lord vs. Veazie*, 8 Howard, 251; *Gaines vs. Hennen*, 24 Howard, 553; *Wood Paper Company vs. Heft*, 8 Wallace, 334; *Cleveland vs. Chamberlain*, 1 Black, 419, and *Forrest vs. Manchester, etc., Ry. Co.*, 4 De Gex, Fisher & Jones, 126, or 65 English Chancery, 126. This opinion has already been extended to such length that I forbear to enter upon a review of those cases further than to say that I deem them, upon their facts and in the principles they involve, inapplicable to the case at bar.

6. Incorporated in the petition is a copy of the bondholders' agreement and proposed plan of reorganization of the Green Bay & Minnesota Railroad Company, which it is alleged Blair and Dodge and their associates seek to consummate to the

alleged detriment of other bondholders and stockholders. I have been somewhat at a loss to determine just the extent to which this extrinsic matter should be considered by the court as bearing upon the validity of the proceedings in the foreclosure suit, or as affording ground for the petitioner to file a bill of review. Certainly it can only be considered to the extent that the particular interests of the petitioner may be involved. The agreement appears to be a voluntary one, and holders of bonds, second as well as first mortgage bonds, with certain stockholders of the company, are permitted to participate in it. The provisions are such as I believe are usual in such agreements. The plan of reorganization contemplates the issue of first and second mortgage bonds, and of preferred and common stock, by a new company, and provides for the exchange, on certain terms and at certain rates, of bonds and stock of the old company for bonds and stock of the new. Such equality of footing as may render secure the various interests of the parties who may enter into the arrangement, appears to be accorded to different classes of bondholders and stockholders, and on the whole, in considering this branch of the case, I do not think that such grounds of objection are presented, or such probable injury to petitioner is shown as makes the petition sustainable.

7. Finally and generally, it may be stated that even if the court were in doubt as to the disposition that should be made of the present petition, it would be a serious question whether that doubt would not have to be resolved against the petitioner because of her own *laches*. As before stated, the bill in the foreclosure suit was filed in January, 1878. Since that time, the bill, subpœna, record of service of subpœna and the answer have been on file. The decree was entered in April, 1879. Nearly two years afterward, and within a few days before the sale is advertised to take place, the present petition is filed. Certainly the delay has been great, and it

can hardly be said that it is sufficiently excused by any averments to that end contained in the petition. Then it is not certain that the petitioner, as the holder of the bonds described in her petition, has any real interest in the subject matter of this controversy. Her bonds are secured by the second mortgage. There is no allegation that they are included in the $850,260 of second mortgage bonds which were issued to take up past due first mortgage coupons and which became secured by the first mortgage, nor is there any averment that the mortgaged property is of sufficient value to pay more than the first mortgage. There is in fact no allegation whatever touching the value of the property covered by the mortgages.

In conclusion, upon all the grounds and for the various reasons stated, the demurrer to the petition will be sustained and the petition will be dismissed.

JOHN S. ROWELL *et al.* vs. EDMUND J. LINDSAY *et al.*

CIRCUIT COURT—EASTERN DISTRICT OF WISCONSIN—MARCH, 1881.

IN EQUITY.

1. PATENT FOR COMBINATION—INFRINGEMENT.—A patent for a combination of known parts is not infringed by the use of any number of the parts less than the whole; but if there are new parts to the combination, which are claimed as inventions, the use of these new parts is an infringement.

2. EXTENT OF CLAIM.—Where the patentee in his claim states only

the combination as his invention, it will be conclusively presumed that the separate parts are old and in common use.

3. SUIT FOR INFRINGEMENT—ABANDONMENT OF CLAIM.—If a patentee, suing for an infringement, declares upon a combination of elements as constituting the novelty of his invention, he cannot abandon a part of such combination and maintain his claims to the rest, much less can he prove part of his combination immaterial or useless.

4. SUBSTITUTION OF PARTS—NEW ELEMENTS—NEW COMBINATION.—A patented combination is not infringed by the substitution for one of the parts, of an element which is new or which performs a substantially different function, or of one which was old, but at the date of the patent not known as a substitute for the omitted part; or by a new combination of the elements of the patent.

5. PATENT FOR CULTIVATOR.—A patent for an improvement in cultivators claimed the combination of a slotted beam, shank, brace-bar and bolt, constructed and arranged to operate as and for the purposes specified: *Held*, that such combination was not infringed by a machine which omitted the brace-bar and did not substitute any equivalent element which wholly performed the same functions.

Jas. J. Dick and *A. R. R. Butler*, for complainants.

Wood & Boyd and *J. P. C. Cottrill*, for defendants.

DYER, J.—This is a bill to restrain the infringement of a patent for an alleged new and useful improvement in cultivators. The original patent was issued to complainants July 3, 1866. A re-issue was granted March 31, 1868. Various defenses are interposed, one of which is that the defendants are selling cultivators made by Thomas, Ludlow & Rodgers, of Springfield, Ohio, which are covered by letters patent No. 152,706, granted to J. H. & J. W. Thomas, June 30, 1874, and they deny that they are infringing complainants' patent. In the specifications of the patent, the invention is described as consisting of the application to the shank, B, of the tooth, a curved brace-bar, C, the upper end of which passes through a slot or mortise in the beam, A, and is held in position by a clamping-bolt, D, which passes transversely through the slot or mortise near the brace-bar, so as

to clamp it in any required position, and thereby adjust the tooth in any inclination, at the same time allowing it to yield to immovable obstacles without breaking. It is further stated in the specifications that "it is evident that, in the device thus constructed and operating, the brace-bar, C, can be so clamped that the tooth will retain its position when working in arable soil, but will yield when coming in contact with an immovable obstacle, and pass over it without breaking; the shank turning back upon its pivot, and the brace-bar being forced up through the slot."

The invention being thus described, what is claimed as new and desired to be secured by letters patent is the "combination of the slotted beam, A, shank, B, brace-bar, C, and bolt, D, when the parts are constructed and arranged to operate as and for the purposes herein specified."

The device patented to J. H. & J. W. Thomas, and which the defendants are selling, consists of a wooden bar or beam having a slit in the rear end to receive the shank of the shovel or tooth. The shank and the tooth consist of one piece of metal, the shank at its upper end being of curved form, and secured in the slit by a bolt or pivot. Another threaded bolt is passed through the beam or drag bar, a little in the rear of the bolt to which the shank of the tooth is fastened, and in such place as to sustain the tooth or shovel when in proper position. It is stated in the specifications of the patent that the ends of the bifurcated bar or beam are drawn down by the threaded bolt which sustains the tooth or shovel when it is in position, or by the united action of both the bolts mentioned, "until clamped against the standard of the shovel with such force that the friction shall maintain the shovel in position while passing through mellow earth, but not so tight but that it will yield to an excessive resistance before force enough is applied to break the shovel." It is further stated that by making the

shank in one piece its construction "is greatly cheapened as compared with that class where an arm has to be welded to the shank;" and the substance of the patentee's claim is, in combination with the drag-bar or beam, bifurcated at the rear end, the shovel standard, curved at its head and where it is adjusted to the drag-bar, and pivoted and clamped by the bolts before described.

The only question which it is necessary to consider is that of infringement. The complainants' patent is for a combination. It is a settled rule of law that where a patent is for a combination of known parts, it is not infringed by the use of any number of the parts less than the whole; for the patent in every such case is for that identical combination, and nothing else, and a combination of any less number of parts is a different thing. This principle has been so often reiterated that it is elementary.[1] There is, however, another class of combinations, where some of the parts are new and others old, and where the new parts are claimed as inventions. If the combination is of this character, the appropriation of the part which is new is an infringement.[2] The complainants claim that their patent falls within the latter class. They insist that the slotted wooden beam used for the purposes designated in their combination is a new invention in and of itself, and that as the defendants use such a beam they infringe. It may be, and in fact the testimony tends to establish, that a slotted wooden beam was not used before complainants' patent for holding cultivator teeth. But this is not enough to make it a new thing within the rule last above stated. As matter of fact, a beam containing a slot or mortise, such as that in the complainants' device, is old, and the most that can be right-

[1] *Prouty vs. Ruggles*, 16 Peters, 336; *Lee vs. Blandy*, 2 Fisher, 89; *Latta vs. Shawk*, 1 Fisher, 465; *Gould vs. Rees*, 15 Wallace, 187.

[2] *Latta vs. Shawk, supra; Lee vs. Blandy, supra; Sharp vs. Tift*, 18 Blatchford, 132.

fully claimed in that respect is that an old and well-known part or thing is applied to a new use as part of a patented combination. Furthermore, the complainants do not in their specifications or claim allege that they are the inventors of the slotted beam, nor of anything less than the entire combination. And it is conclusively settled that where a patentee claims as his invention only the combination which he describes, the separate parts which constitute the combination are to be regarded as old, or common and public.

In *Rich vs. Close*, 4 Fisher 282, it was said, by Judge Woodruff, that "an inventor must be taken to know of what his invention consists, and his patent does not secure to him the exclusive right in anything more than he claims to have invented. * * * Here the patentee has narrowed his claim by the use of terms which are express and clear: 'What I claim as my invention, and desire to secure by letters patent, is the combination of the wheel, constructed as hereinbefore described, with the spiral conductor, D, and tube, F, so as to get the full pressure of the water while the wheel is relieved of its weight, in the manner and for the purpose set forth.' He does not claim to have invented either of these parts separately, nor to have invented a useful combination of any two of the parts without the third. He may have invented each of them, but he has not obtained a patent for either of them. We are therefore left to the assumption that each was old, and that his specific combination alone was new."

In *The Corn-planter Patent*, 23 Wallace 224, it was held that "where a patentee, after describing a machine, claims as his invention a certain combination of elements, or a certain device or part of the machine, this is an implied declaration, as conclusive, so far as that patent is concerned, as if it were expressed, that the specific combination or thing claimed is the only part which the patentee regards as new. True, he

or some other person may have a distinct patent for the portions not covered by this; but that will speak for itself. *So far as the patent in question is concerned, the remaining parts are old or common and public.*"

These statements of the law, as thus expressed in the two cases cited, are exactly applicable to the case at bar. Here, as in *Rich vs. Close, supra*, the patentees have narrowed their claim by the use of clear and express terms: "What we claim as new, and desire to secure by letters patent, is the combination of the slotted beam, A, shank, B, brace-bar, C, and bolt, D, when the parts are constructed and arranged to operate as and for the purposes herein specified." Not having claimed to have invented either of the parts separately, and expressly claiming only a certain combination of parts as described, there is an implied declaration, as conclusive as if it were expressed, that the specific combination is the only part which the patentees regard as new, and that the several parts of the combination are old. Upon the highest authority, it therefore conclusively appears, I think, that complainants are not in a position to claim that their slotted beam was of itself a new invention or discovery. And, as before stated, it is not enough to say that it was not before used for holding cultivator teeth; for it cannot be reasonably claimed that the mere application of an old thing to a new use in a combination is such invention of a new part as would bring the case within that class of combinations where the appropriation of a single part is an infringement. But it is contended that the slotted beam is the distinctive and essential feature of complainants' invention, and should be regarded as such in passing on the question of infringement. The court must, however, look at the entire specifications and claim of the patentees, in determining what their invention is. The combination is an entirety. Unless it is maintained as such the whole of the invention fails. If one of the elements is

given up the thing claimed disappears. Where a patentee, suing for an infringement, declares upon a combination of elements which he asserts constitutes the novelty of his invention, he cannot abandon a part of such combination and maintain his claims to the rest. Much less can he prove any part of his combination immaterial or useless.[1] The different parts may perform more or less important functions, but each and all are essential to make the thing which the patentee has claimed as his invention.

It follows, from what has been stated, that the defendants do not infringe the complainants' patent by merely using the slotted beam. They do not infringe unless they have appropriated the entire combination. The patentees declare in their specifications what their invention is. They expressly say, *inter alia*, that it consists "*in applying to the shank of the tooth a curved brace-bar*, the upper end of which passes through a slot or mortise in the beam." The defendants use the slotted beam, the shank of the tooth, and the clamping bolt. But in their device there is no brace-bar welded to the shank, and passing up through the mortise in the beam. Both parties use the pivot which attaches the shank to the beam; but this pivot is not claimed by the complainants as part of their invention. As, therefore, the construction of the defendants' device does not include the curved brace-bar, if the case were to stop here it would seem that the patentees' entire combination is not appropriated, and so that there is no infringement. But it is insisted that the difference between the two devices is one merely of form, and that in fact all the elements of the complainants' machine are present in that which the defendants are selling. There is no doubt of the right of a patentee to invoke the doctrine of equivalents on a question of infringement in the case of a combination patent. The law upon this subject is settled in *Conner vs.*

[1] *Vance vs. Campbell*, 1 Black, 427.

Roach, 4 Fisher, 12; *Seymour vs. Osborne*, 11 Wallace, 516; and in *Gould vs. Rees*, 15 Wallace, 187. In the case of *Seymour vs. Osborne* the court say on p. 556 that "mere formal alterations in a combination * * * are no defense to the charge of infringement, and the withdrawal of one ingredient from the same, and the substitution of another which was well known at the date of the patent as a proper substitute for the one withdrawn, is a mere formal alteration of the combination, if the ingredient substituted performs substantially the same function as the one withdrawn." But the court also say on p. 555 that to constitute infringement all the material ingredients of the prior combination must be appropriated, and that the inventors of a combination "cannot suppress subsequent improvements which are substantially different, whether the new improvements consist in a new combination of the same ingredients, or of the substitution of some newly-discovered ingredient, or of some old one performing some new function not known at the date of the letters patent as a proper substitute for the ingredient withdrawn." And in *Gould vs. Rees*[1] the court say: "*Bona fide* inventors of a combination are as much entitled to equivalents as the inventors of other patentable improvements. * * * Apply that rule and it is clear that an alteration in a patented combination which merely substitutes another old ingredient for one of the ingredients in the patented combination, is an infringement of the patent if the substitute performs the same function and was well known at the date of the patent as a proper substitute for the omitted ingredient; but the rule is otherwise if the ingredient substituted was a new one, or performs a substantially different function, or was not known at the date of the plaintiff's patent as a proper substitute for the one omitted from his patented combination. Where the defendant, in constructing his machine, omits entirely one of the ingre-

[1] 15 Wallace, page 194.

dients of the plaintiff's combination without substituting any other, he does not infringe; and if he substitutes another in the place of the one omitted, which is new, or which performs a substantially different function, or if it is old, but was not known at the date of the plaintiff's invention as a proper substitute for the omitted ingredient, then he does not infringe." See, also, *Gill vs. Wells*, 22 Wallace, 1.

It follows, therefore, from these statements of the law, that if the defendants omit entirely one of the elements of the complainants' combination without substituting any other, or if they substitute another which is new, or which performs a substantially different function, or if it is one that is old, but was not known at the date of the complainants' patent as a proper substitute for the omitted ingredient, or if their machine consists in a new combination of the same ingredients, then the defendants do not infringe. A material ingredient of complainants' device is the curved brace-bar, welded to the shank of the tooth. This cannot be denied. If the defendants, omitting the brace-bar, have substituted an element in its place, that substitution consists not in supplying by physical addition another part, distinct from the rest of the device, in the place of that omitted, but in merely changing the form of the head of the shank where it rests in the mortise in the beam. In the complainants' device the curved brace-bar is welded to the rear of the shank about midway between the point where the shank is pivoted to the beam and the tooth, and passes into the mortise at the end of the beam, where it may be clamped. As before stated, the tooth and shank of defendants' device consists of a single piece of metal, the head of the shank, where it passes into the mortise at the end of the beam, being curved, and resting on the clamping bolt at proper distance from the point where it is pivoted to the beam. Is the curved form of the head of the shank the equivalent of complainants' brace-

bar, in the sense of the authorities cited? It was argued that the word "brace," as used in complainants' specifications, has reference to the functions of an arm, or an enlargement of the upper portion of the shank of the shovel, and that the curved head of the standard or shank in the defendants' device, lying within the mortise, operates as an arm, and secures the same leverage or frictional power as does the complainants' brace-bar. Whether this feature of complainants' combination be called a brace or an arm, there can be no question of the function it is intended to perform. It is not only to be clamped in the slot in the beam so as to hold the tooth securely in working position, but it is evidently intended to strengthen the shank below the beam so as to prevent it from bending or breaking when in operation, which is one of the primary functions of a brace. The complainant, John S. Rowell, testifies that the brace thus welded to the shank between the tooth and the beam stiffens the shank, and allows the use of a lighter material for the shank than could otherwise be used. It operates as a support, which it would seem removes the terminal strain from a point immediately below the beam to a point midway or below the center of the shank. This function of the brace is not found in the construction of defendants' machine, for it is evident that, as it is constructed, the strain terminates on the shank at the point where the shank is clamped. So that while it may be said that frictional resistance or leverage between the pivoted point and the clamping bolt is obtained in both devices, it is observable that the complainants' brace performs a function that is omitted in defendants' machine. It affords support to the shank, strength to the structure, and the suitable term, "brace-bar," is used in complainants' specifications as expressive of power of resistance. And it is, therefore, not difficult to understand, as some of the witnesses have testified, why the complainants' device is recognized by the public as the

"brace-tooth," and as capable of greater resistance, and less liable to bend or break than the defendants' machine.

Then, I think, there is force in the claim that the curved part of the shank lying within the beam in defendants' device performs a function not found in complainants' combination. The curved head rests on the clamping bolt, so that thereby all the teeth may be adjusted to a line. The function of alignment is thus secured, and, by this arrangement of the parts, the bolt on which the head of the shank rests becomes not only a clamping device but an aligning bolt. Furthermore, it is quite apparent, from an examination of the models, that in the operation of the defendants' machine, when, for example, the team is backed, the pressure does not move the teeth out of position, because the clamping bolt on which the curved head of the shank rests operates as a stop and prevents any forward movement of the teeth; whereas, in complainants' device, it is evident that if the brace is not set so tightly in the mortise that it cannot escape, it might, in backing, be drawn entirely out, and the teeth would be pressed forward, with nothing to operate as a stop except the pivot which fastens the shank to the beam, and with a liability that as the machine should be started forward its movement might be such as to cause the brace to catch on the beam, or to prevent it from passing directly back within the slot or mortise.

From what has been said, and without further elaboration, it would appear that the claim made by defendants is not without reason to support it, namely, that in their device they omit the brace-bar and do not substitute for it an element which wholly performs the same function; that, therefore, their substituted element, if there is one, is not an equivalent, because, "by an equivalent in such a case it is meant that the ingredient substituted for the one withdrawn performs the same function as the other."[1] Further, that in the construc-

[1] *Gill vs. Wells*, 22 Wallace, 1.

tion of their device a new element is introduced which performs a function substantially different from that which the complainants' device was designed to perform; and, in short, that the defendants' combination is a new arrangement of parts so different from the complainants' as not to be the equivalent, within the principles applicable to combination patents.

There is considerable similarity, at least in the application of principles, between this case and the case of *Prouty vs. Ruggles.*[1] Adopting the language of the court in that case, p. 341, it may be well said here: "None of the parts referred to are new, and none are claimed as new; nor is any portion of the combination less than the whole claimed as new, or stated to produce any given result. The end in view is proposed to be accomplished by the union of all, arranged and combined together in the manner described. And this combination composed of all the parts mentioned in the specifications, and arranged with reference to each other * * * in the manner therein described, is stated to be the improvement and is the thing patented. The use of any two of these parts only, or of two combined with a third which is substantially different in form or in the manner of its arrangement and connection with the others, is therefore not the thing patented. It is not the same combination if it substantially differs from it in any of its parts."

Certain models were prepared and submitted by one of the expert witnesses, as illustrating the supposed identity of the two devices in question, but I do not think they demonstrate such identity. The structural arrangements of the parts in the two machines is substantially different. The brace-bar is a distinct member of the complainants' combination. They have claimed it in their specifications to be an essential part of their invention. It is the construction of the several parts,

[1] *Supra.*

not separately, but in combination, which they claim to be new, and their improvement consists in arranging different parts of the cultivator, and combining them together in the manner stated in the specifications, for the purpose of producing a certain effect.

Let the bill be dismissed.

NOTE.—A patent for a combination is infringed by the use of a similar combination, where one of the elements of the patented combination is omitted and another substituted for it unless the substituted device is a new one, or was not known at the date of the patent as a proper substitute for the one omitted. *Welling vs. Rubber-Coated Harness Trimming Co.* 1 Banning & Arden, 282; *Webster vs. New Brunswick Carpet Co.* 1 Banning & Arden, 84; *Imhaeuser vs. Buerk*, 101 United Sates, 647; *Whittlesey vs. Ames*, 9 Bissell, 225; *American Whip Co. vs. Lombard*, 3 Banning & Arden, 598; *Water-Meter Co. vs. Desper*, 101 United States, 332.

And equivalent devices, acting in the same combination to accomplish the same result as in the patented combinations, are not relieved from liability to the charge of infringement, because they accomplish more than the devices in the patented combinations. *Kendrick vs. Emmons*, 2 Banning & Arden, 208.

So a change in the location of one of the elements of a patented combination will not evade the charge of infringement, where all the parts operate substantially the same way and produce the same result. *Knox vs. Great Western Quicksilver Mining Co.* 6 Sawyer, 430.

And where the defendant has employed all the parts in combination, covered by the claims of the patent, he cannot escape liability for infringement, because of the employment of others in addition. *Williams vs. Boston & Albany R. R. Co.*, 17 Blatchford, 21.

It is not an infringement of a patent for a combination to use any part of the combination less than the whole where the part used is composed of elements not new in themselves. *Craig vs. Smith*, 1 Banning & Arden, 556.

Where the defendants have discarded one of the essential elements of the patented combination, they do not infringe. *Smith vs. Marshall*, 2 Banning & Arden, 371; *Fisher vs. Craig*, 3 Sawyer, 69.

A patent for an invention consisting entirely of a new combination of old elements or ingredients, is not infringed unless by the use of all the elements or ingredients of such patented combination. *Sandford vs. Merrimack Hat Co.*, 2 Banning & Arden, 408.

While a patent for a combination is not infringed, if a material part of it is omitted, yet if a part which is only formally omitted is supplied by

a mechanical equivalent performing the same office and producing the same result, it is infringed. *Water-Meter Co. vs. Desper*, 101 United States, 332.—[Reporter.

JOSE A. PICKEL vs. JESSE ISGRIGG *et al.*

Circuit Court—District of Indiana—April, 1881.

1. Practice—Demurrer to Evidence—When Allowed.—The party upon whom rests the burden of proof in the trial of a fact before a jury, cannot demur to the evidence of the adverse party.

2. Facts Admitted by Demurrer—Record.—A demurrer to evidence must distinctly admit on the record every fact which there was any evidence tending to prove, so that the court will have nothing to do but to apply the law to the established facts.

Baker, Hord & Hendricks and *George Carter*, for plaintiff.

Claybaugh & Higinbotham and *Herr & Alexander*, for defendant, Isgrigg.

Gresham, J.—The plaintiff, as indorsee of a negotiable promissory note, sued Jesse Isgrigg as maker and George B. Forgy as indorser. Failing to appear, judgment was entered against Forgy by default. Isgrigg answered: (1) Special *non est factum*; (2) that Forgy was the owner of the note and the real party in interest; (3) general *non est factum*. The defendant demanded a jury. A number of witnesses testified for the plaintiff, the note was read to the jury, and the plaintiff rested. Some of the witnesses testified that they

saw the defendant sign the note after it had been read over to him in their presence and hearing. The defendant then testified in his own behalf, denying that he had ever signed the note, or authorized any one else to sign it for him. Other witnesses also testified for the defendant. The evidence of one or more of the defendant's witnesses tended to show that Forgy was still the owner of the note, and that he had indorsed it to the plaintiff, who is his sister, and a citizen of the state of Iowa, for the purpose of collecting it in this court.

After the defendant had concluded his evidence and rested, the plaintiff, by her counsel, announced that she demurred to the evidence. Time was given to prepare the demurrer, and the jury was discharged. This was done without objection by the defendant. The entire evidence on both sides, as reported by the stenographer, is set out in the demurrer which was afterwards filed. The demurrer concludes as follows: "And this being all the evidence given in the cause, the plaintiff says the evidence of the defendant Jesse Isgrigg, given in support of the issues tendered by him herein, is not sufficient for him to have and maintain his defense in this action, and therefore she demurs thereto, and prays that said Isgrigg be required to join in this demurrer; and the plaintiff admits the facts stated by the witnesses for the defendant herein before set out, and every inference and conclusion the jury may rightfully and reasonably draw therefrom."

Neither on the argument of the demurrer, nor at any previous time, was there any objection to the sufficiency of the demurrer or the regularity of any of the proceedings connected therewith. It is insisted by counsel for the plaintiff that the form of the demurrer, and the action of the court thus far in connection with it, are in conformity with the practice in Indiana, as settled by the Supreme Court of the state, and that the jury could not have rendered a verdict for

the defendant under any fair or reasonable construction of the evidence, and therefore the demurrer should be sustained, and judgment entered for the plaintiff. So far as known, this is the first time there has been a demurrer to evidence in this court. Isgrigg denied the execution of the note in his sworn answer, and that compelled the plaintiff to assume the burden of the issue.

The evidence of a party, holding the affirmative side of an issue of fact before a jury, may be demurred to by the adverse party under certain conditions. The party upon whom the burden of the issue rests is not permitted to demur to the evidence of the other party, for he cannot be allowed to assume that he has made out his case. If there is evidence tending to prove a fact, that fact must be distinctly admitted in the demurrer to be absolutely true, so that the court will have nothing to do but apply the law to the established facts. And this is the case, whether the evidence be direct and positive, or circumstantial and uncertain. If there be circumstantial evidence only slightly tending to prove a fact, the demurring party is required to admit that fact to be absolutely true before the opposite party will be required to join in the demurrer. Unless the necessary admissions are distinctly made of record, no judgment can be pronounced on the demurrer, for the court is not substituted for the jury to weigh the evidence. The relative functions of the court and jury are not to be lost sight of in determining the proper practice in a matter of this kind. The court admits to the jury all evidence which tends in any degree to prove or disprove the issue, and it is for the jury to say how far the evidence goes in proving or disproving the issue. In other words, it is the exclusive province of the jury to weigh the evidence which the court has admitted as relevant to the issue. The right of trial by jury is in effect destroyed by holding, as some of the courts have held, that on a demurrer

to the evidence the court takes the place of the jury and finds for the demurring party, unless, by a fair and reasonable construction of the evidence, the jury might have found for the adverse party.

I am aware that there are expressions in the opinion of the court in the case of the *U. S. Bank vs. Smith*, 11 Wheaton, 172, which do not sustain the views here announced. In delivering the opinion of the court in that case Mr. Justice Thompson says: "By a demurrer to the evidence the court in which the case is tried is substituted in the place of the jury; and the only question is whether the evidence is sufficient to maintain the issue. And the judgment of the court on such evidence will stand in the place of the verdict of the jury." "And everything which the jury could reasonably infer from the evidence demurred to is to be considered as admitted." But at a later day in the same term, in the case of *Fowle vs. Common Council of Alexandria*, 11 Wheaton, 320; in delivering the opinion of the court, Mr. Justice Story says: "It is no part of the object of such proceedings (demurrer to evidence) to bring before the court an investigation of the facts in dispute, or to weigh the force of testimony or the presumptions arising from the evidence. That is the proper province of the jury. The true and proper object of such a demurrer is to refer to the court the law arising from facts. It supposes, therefore, the facts to be already admitted and ascertained, and that nothing remains but for the court to apply the law to those facts."

In the earlier case of *Young vs. Black*, 7 Cranch, 565, the same learned judge says: "The party demurring is bound to admit as true not only all the facts proved by the evidence introduced by the party, but also all the facts which that evidence legally may conduce to prove."

In the case of *Chenoweth vs. Lessees of Haskell*, 3 Peters, 92, Chief Justice Marshall says: "The defendants in the district

court having withdrawn the case from the jury by a demurrer to evidence, or by having submitted to a verdict for the plaintiffs, subject to that demurrer, cannot hope for a judgment in their favor, if by any fair construction of the evidence the verdict can be sustained." That was an action of ejectment, brought by the defendants in error to recover 50,000 acres of land, part of which was in the occupancy of the defendants in the court below. The defendants in that court disclaimed as to part of the land, and went to trial as to the residue. The original plaintiffs had the oldest title, and the case depended on the question whether their grant covered the land in dispute. According to the courses and distances given in the plaintiffs' patent, a survey excluded the land in dispute. At the trial in the court below the plaintiffs read the deposition of one Wilson, who made the survey of the 50,000 acres. He testified that the line which formed the western boundary of the land intended to be granted was never run or marked. In his office he assumed a course and distance, and terminated the line in his mind at two small chestnut oaks in the wilderness, without indicating in his survey just where the two chestnut oaks might be found. No natural objects were given in the survey by which the course and distance might be controlled. Wilson had marked two small chestnut oaks as the corner of Robert Young's tract, and it was these two trees which he had in his mind, without indicating his intention on his survey.

The defendants demurred to the plaintiffs' testimony, and the jury found a verdict for the plaintiffs, subject to the judgment of the court on the demurrer. The court overruled the demurrer and gave judgment for the plaintiffs. This ruling was reversed on writ of error, the Supreme Court holding that the defendants in error were not entitled to the land in possession of the plaintiffs in error, because neither the patent nor the face of the plat furnished any information by which the

corner called for in the patent could be controlled. This decision was in effect that the testimony of Wilson was inadmissible to control the grant, and, that testimony out of the record, there was nothing to sustain the claim of the plaintiffs below to the land in dispute. There being no legal evidence in support of the affirmative of the issue in the court below as to the land in dispute, of course the demurrer should have been sustained. This case, on its facts, is not in conflict with the ruling in *Fowle vs. Common Council of Alexandria, supra*, which is sustained both by reason and authority.[1]

The plaintiff's counsel relied mainly on the decisions in the Supreme Court of this state. In *Straugh vs. Gear*, 48 Indiana, 100, the appellees, as indorsees of a promissory note, sued the maker. The answer admitted the execution of the note, but charged that the defendant's signature was procured to the same by fraudulent representations, of which the plaintiffs had notice. It seems that when the defendant concluded his testimony and rested, the plaintiff demurred to the evidence, and the court sustained the demurrer. On appeal the case was affirmed on the ground that there was no evidence to show that the plaintiffs below bought the note with knowledge of the defense which the makers had against the payee.

The evidence of the defendant, upon whom the affirmative of the issue rested, was relative to a part only of that issue, and it is clear that in such a case a demurrer to the evidence may be safely risked, while it is fatal to a demurrer if there be evidence relevant to the whole issue. In deciding this case on appeal the court says: "When the plaintiff demurs to the evidence of the defendant, he should set out all the evidence offered by the plaintiff and defendant at full length, so that the court may determine upon the whole evidence for whom judgment shall be rendered." This announcement of the

[1]Gould on Plead. c. 9, part 2; *Copeland vs. New England Ins. Co.* 22 Pickering, 135; *Gibson vs. Hunter*, 2 H. Blackstone, 187.

court, besides being objectionable as confounding the relative functions of court and jury, was hardly called for in the decision of the case.

Thomas vs. Ruddle, 68 Indiana, 326, was also a suit by the appellee, as indorsee, against the maker of a promissory note payable at a bank in this state. The answer was *non est factum*, and this was the only issue in the case. After all the evidence was in on both sides, the plaintiff, although he had the burden of the issue, demurred to the evidence, setting it all out in his demurrer, and it was sustained by the court. On appeal it was held that much of the evidence which tended to show that the defendant's signature to the note had been procured by fraud was irrelevant under the issue of *non est factum*, and the case was affirmed on the ground that the defendant below was guilty of negligence in signing the note, and that the plaintiff below acquired the note after it became due, but from prior indorsees, who, for anything that appeared, to the contrary, were *bona fide* holders. "But," say the court, "when either party demurs to the evidence his demurrer must be ruled upon according to the practice in this state, in view of all the evidence which has been given in the cause at the time the demurrer was filed."

Other Indiana cases were cited in support of the demurrer, but they need not be reviewed, as I think the law is correctly stated in *Fowle vs. Common Council of Alexandria*, *supra*.

In the case in hand, the plaintiff had no right to assume that she had sustained the affirmative of the issue and demur to the defendant's evidence.

There was no joinder in the demurrer, which was necessary, and the proper admissions were not made in the demurrer, or upon the record, upon which the court could found a judgment. A new trial is the only solution of the embarrassment.

NOTE.—A demurrer to evidence is only applicable to the evidence of

the adverse party, holding the affirmative of the issue, and cannot be applied to negative testimony. *Goodman vs. Ford*, 23 Mississippi, 592; *Stiles vs. Inman*, 55 Mississippi, 469.

But in some of the cases it is said that either party has a right to demur to the evidence of the other. But these cases were where a special defense was set up to an action on a promissory note. *Green vs. Buckner*, 6 Leigh (Va.), 82; *Rohr vs. Davis*, 9 Leigh, 30; *Thomas vs. Ruddell*, 66 Indiana, 326; *Strough vs. Gear*, 48 Indiana, 100.

A demurrer to evidence must state facts and not merely the evidence conducing to prove them. *Waul vs. Kirkman*, 27 Mississippi, 823; *Harden vs. Snyder*, 15 Iowa, 460; *Dormady vs. State Bank*, 2 Scammon 236.

A plaintiff is not bound to join in a demurrer to evidence, which merely states the evidence, and not the facts which it tends to establish. *Crowe vs. People*, 92 Illinois, 231.

But after a voluntary joinder the plaintiff cannot object that the demurrer admits the evidence instead of the facts which the evidence goes to establish. *Valtez vs. O. & M. R'y Co.*, 85 Illinois, 500.

But where the evidence is plain and direct, and not contradictory or inferential, it is sufficient to state the evidence, without stating the facts which are deducible from it. *Ditto vs. Ditto*, 4 Dana (Ky.), 502.

In a demurrer to evidence the party who demurs is held to admit every fact, which a jury in the exercise of a fair and reasonable discretion, could infer from the evidence; but he does not admit forced or violent inferences. *Jones vs. Vanzandt*, 2 McLean, 596; *Fowle vs. Common Council*, 11 Wheaton, 320; *United States Bank vs. Smith*, 11 Wheaton, 172; *Thornton vs. Bank of Washington*, 3 Peters, 40; *Copeland vs. New England Ins. Co.*, 22 Pickering, 135; *Clopton vs. Morris*, 6 Leigh, 278; *Donaldson vs. Waters*, 30 Alabama, 175; *Higgs vs. Shehee*, 4 Florida, 382; *Tucker vs. Bitting*, 32 Pennsylvania State, 428; *Booth vs. Colton*, 13 Texas, 359; *Forbes vs. Church*, 3 Johnson's Cases, 159; *Chapize vs. Bane*, 1 Bibb (Ky.), 612; *Bradbury vs. Reed*, 23 Texas, 258; *Bates vs. Bates*, 38 Alabama, 102; *McCreary vs. Fike*, 2 Blackford, 374; *Valtez vs. O. & M. R'y Co.*, 85 Illinois, 500; *Fent vs. T., P. & W. R. W. Co.* 59 Illinois, 349; *Phillips vs. Dickerson*, 85 Illinois, 11; *Atherton vs. Sugar Creek, etc., Co.*, 67 Indiana, 334; *Coates vs. Galena, etc., R. R. Co.*, 18 Iowa, 277; *Jones vs. Ireland*, 4 Iowa, 63; *United States vs. Williams*, Ware, 175.—[Reporter.

UNITED STATES vs. FRANK BIXBY.

DISTRICT COURT—DISTRICT OF INDIANA.—APRIL, 1881.

1. EMBEZZLEMENT—ASSIGNEE IN BANKRUPTCY.—An assignee in bankruptcy cannot be convicted of embezzlement under section 5504 of the Revised Statutes.

2. SCOPE OF SECTION 5504 OF REVISED STATUTES.—Under that section an officer can only be guilty of embezzling such moneys as he is required to deposit with the Treasurer, Assistant Treasurer, or a designated depositary of the United States, in the name and to the credit of the court.

3. CONVERSION OF TRUST FUNDS BY ASSIGNEE.—There is no statute making it embezzlement for an assignee in bankruptcy to convert to his own use trust funds which come into his hands.

Motion to quash indictment for embezzlement.

C. L. Holstein, U. S. District Attorney, for United States.

Gordon, Lamb & Shepard, for defendant.

GRESHAM, J.—The defendant is indicted for embezzling funds which came into his hands as assignee of several estates in bankruptcy. The indictment is based upon section 5504 of the Revised Statutes, which reads as follows: "Every clerk or other officer of a court of the United States, who fails forthwith to deposit any money belonging in the registry of the court, or thereafter paid into court, or received by the officers thereof, with the treasurer, assistant treasurer, or a designated depositary of the United States, in the name and to the credit of such court, or who retains or converts to his own use, or to the use of another, any such money, is guilty of embezzlement," etc.

It is only such moneys as are required to be deposited

with the Treasurer, Assistant Treasurer, or a designated depositary of the United States, in the name and to the credit of the court, that an officer can be guilty of embezzling under this section. An assignee in bankruptcy is an officer of the court, but the funds of the estate which come into his hands are not required to be deposited in any of the places designated in this section, in the name of the court and to its credit.

It is provided in section 5059 of the Revised Statutes that the assignee shall, as soon as may be after receiving any money belong to the estate, deposit the same in some bank, in his name as assignee, or otherwise keep it distinct from all other money in his possession. The acts charged in the indictment are not covered by section 5504, and there seems to be no other statute making it embezzlement for an assignee in bankruptcy to convert to his own use trust funds which come into his hands. The motion to quash is sustained.

LOUISA F. CHEW *et al.* vs. ROBERT W. HYMAN *et al.*

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—APRIL, 1881.

IN EQUITY.

1. JUDICIAL SALE—DEVISEES—PARTIES.—Wm. F. Johnson owned in fee the undivided half of land, and made an ordinary trust deed with power of sale to John V. LeMoyne, and afterward sold and conveyed the land to John A. Washington, subject to the trust deed. Washington died testate in 1861, providing that his real estate should be equally divided among his children, as they should become of age, and until then they were to be maintained and educated out of the proceeds arising from it. The executor was empowered to sell the land in such manner and on such terms as to him should seem best for the interest of the children and re-invest the proceeds. In 1864, Susan C. Williams, the payee and holder of the bond, filed a bill to foreclose said trust deed, against LeMoyne as trustee, and the executor of the will of Washington, who were the only defendants, alleging that the trustee was unwilling to execute the trust without an order of court.

2. FEE TO EQUITY OF REDEMPTION.—The court ordered the premises sold, which was done and the surplus proceeds paid to the executor; *Held*, that by the will of John A. Washington the fee to the equity of redemption was vested in his children.

3. THE SALE A JUDICIAL ONE—PARTIES.—That under the circumstances of the case, the sale made under the decree was to be regarded as a judicial sale by the court, and not as a sale made under the power contained in the trust deed, and being a judicial sale, the owners of the fee burdened with the indebtedness were necessary parties to the suit.

4. FORTY-NINTH RULE—FEE NOT IN EXECUTOR.—That the fee of the land was not vested in the executor so as to make the 49th rule applicable.

5. EXECUTOR—EXERCISE OF POWER—RATIFICATION.—The executor being only empowered to sell for the purpose of re-investment could not ratify a sale not made by himself under the power so as to bind the devisees under the will.

6. NO UNDUE DELAY—LACHES.—All of the complainants being minors

at the time of the proceedings, under the circumstances there was no undue delay in bringing suit.

7. REDEMPTION.—*Held further*, that the heirs at law were entitled to redeem the premises upon equitable terms.

Goudy & Chandler, for complainants.

Kales & Smith, for defendants.

BLODGETT, J.—By this bill the complainants seek to redeem the lands in question from a trust deed given as security for the payment of money.

The material facts as they appear in the record are, that on and before the 16th of February, 1859, one William F. Johnson, was seized in fee of the undivided half of section 21, town 39 North, range 13 East, situate in Cook county, in Illinois, and on that day made a deed of the premises in fee to John V. LeMoyne in trust, to secure the payment of the bond of Johnson to Susan C. Williams, for $4,500.00, with power to the trustee, in case of default in the payment of the indebtedness, to sell said premises at public vendue, after giving thirty days notice of the time and place of such sale, in the manner specifically provided in said deed, and out of the proceeds to pay said indebtedness and the cost of sale.

On the 20th of June, 1859, after the making and recording of said trust deed, Johnson sold and conveyed the premises to John A. Washington, subject to the trust deed, and by the terms of the conveyance Washington assumed and agreed to pay the indebtedness secured by said trust deed. On the 13th day of September, 1861, John A. Washington died testate, leaving as surviving heirs his children, Louisa F., Jane E., Eliza S., Anna M., Lawrence, Eleanor and George, who with the husbands of the married daughters are the complainants in this case.

By his last will and testament, bearing date on the 15th of August, 1861, John A. Washington, after bequeathing to

his son Lawrence certain family heir-looms, mementoes, books and manuscripts, disposed of the residue of his property in the following terms:

"3d. I give all the property of which I may die possessed, other than that just mentioned, to be equally divided among my children, as they respectively become twenty-one years old, and until then to be maintained and educated out of the proceeds arising from it."

"4th. I constitute and appoint my brother, Richard B. Washington, and my friends, William Fontaine Alexander and Edward C. Turner, executors of this my last will and testament, and I hereby empower them, or the survivors or survivor of them, to sell any property of which I may die possessed, and which is beyond the limits of Virginia, in such manner and on such terms, and for such price as to them or him shall seem best for the interest of my children, and to re-invest the proceeds arising from such sale in such other property as they may think best for my children."

The will was duly probated in Fauquier county, Virginia, in November, 1861, and letters testamentary issued to Richard B. Washington, as sole executor, Alexander having died, and Turner having renounced all rights as executor under the will.

In December, 1861, Richard B. Washington, as executor of John A. Washington, gave to George R. H. Hughes, two contracts in writing, by the terms of one of which Hughes was to conduct a suit then pending in the Supreme Court of the United States in which said John A. Washington was appellant, and Mahlon D. Ogden was appellee, to a determination thereof, and to pay all costs and charges necessary to conduct said suit; and said executor agreed to pay Hughes, as compensation for his services rendered and to be rendered by him in the said suit, one-third of the proceeds of the sale of said real estate of John A. Washington lying in Cook county, Illi-

nois, after payment of the incumbrances then on said land, or to give Hughes in lieu of said proportion of proceeds, one-third part of said real estate which might remain after payment of the incumbrances, Hughes to pay all the expenses of employing counsel and conducting said suit, and in case of a determination thereof in favor of Ogden, he was to receive no compensation for his services rendered or to be rendered.

By the terms of the other of these contracts, Hughes was to take charge of the half section now in controversy and one other tract, and to sell so much thereof as was necessary to pay the incumbrances thereon, and advance the money required to pay the incumbrances and taxes, and was to receive for his services one-fourth of the proceeds after paying the incumbrances and expenses.

The proof also shows that in the Spring of 1862, the executor gave to Hughes a power of attorney to bring and defend any suits concerning the estate of John A. Washington, in Cook county, also to negotiate and make sales of said property or any part thereof, and apply the proceeds to the payment of any incumbrances or any other debts in Illinois, and to such other objects and ends as Hughes might deem best.

On the 12th day of March, 1864, Susan C. Williams, the payee and holder of the bond secured by the deed of trust from Johnson to LeMoyne, filed upon the chancery side of this court her bill, setting out in substance that said bond had, by its terms become due and payable on the 16th of February, 1864, and that the same remained wholly unpaid; that said John A. Washington had assumed the payment of said indebtedness, and had died, and that Richard B. Washington was his executor; that Mr. LeMoyne, as trustee, was unwilling to execute the trust without an order of court, and prayed that an accounting might be had of the amount due on the bond, and that LeMoyne, as trustee, be directed by the court to sell said premises, in pursuance of the powers con-

tained in the trust deed, and out of the proceeds of the premises to pay the complainant, Mrs. Williams, the amount found due her, and to bring the residue into court for the benefit of the parties entitled thereto. The only defendants to said bill were Richard B. Washington, the executor, and Mr. LeMoyne, the trustee. On the same day that the bill was filed, Mr. LeMoyne, the trustee, entered his appearance and filed his answer, and on the same day the appearance of Richard B. Washington was entered in said cause by Hughes as his attorney in fact, service of process waived and his answer filed admitting the substantial allegations of the bill, and a decree was entered on the same day finding that there was due Mrs. Williams the sum of $4,500.00 principal, and $262.00 for interest on the bond secured by said trust deed, declaring the same a lien on said premises, and directing said premises to be sold to pay said indebtedness, and that LeMoyne should proceed to execute the power vested in him as such trustee, and make sale of said premises without benefit of redemption.

The decree also found that it was necessary to sell the whole of said premises, the interest being an undivided one; that he should sell the same at public vendue, after first giving thirty days' notice in the *Chicago Post*, a newspaper published in the city of Chicago, and make and deliver to the purchaser or purchasers a good and sufficient deed or deeds of conveyance in fee simple, and that he should pay to Mrs. Williams the sum of $4,762.00, with interest at six per cent. from the date of the decree, and pay the balance of the proceeds into court, to be drawn out by Richard B. Washington, as executor of John A. Washington, and to make report to the court of his doings in that behalf, for the approval of the court.

In pursuance of this decree, Mr. LeMoyne, on the 26th day of April, 1864, offered the premises at public vendue,

and the same were struck off and sold to the defendant, Robert W. Hyman, for the sum of $9,700.00, and the trustee made and delivered to the defendant, Hyman, a deed of all the right, title and interest, both at law and in equity, which said trustee had acquired in the said premises by said trust deed, and thereupon duly reported his proceedings under said decree to the court, and paid into court the sum of $4,300.00, being the balance left after paying the amount due Mrs. Williams, and the cost of said proceedings.

It further appears, that after the consummation of said sale, the money so paid into court was withdrawn by Hughes, as agent and attorney of Richard B. Washington, and all except enough to make, with the amount paid Mrs. Williams and the costs, $6,000.00, was refunded to the defendant, Hyman, by Hughes, and thereupon defendant, Hyman, made two notes of $4,500.00, each, payable to Richard B. Washington, executor, with interest at six per cent., one on the 26th of April, 1865, and the other on the 26th of October, 1865, and secured payment of the same by a trust deed on said premises.

In May, 1865, Hughes and Richard B. Washington met in Baltimore, Maryland, and Hughes rendered an account of the proceeds of said land, and turned over to the executor the last note of Hyman for $4,500.00, and the same was subsequently fully paid to the executor.

None of the present complainants, children of John A. Washington, were made parties to this suit by Mrs. Williams, and the testimony shows that none of these children were aware of this suit, or that the land in question had been sold under the decree of this court, until a short time before this suit was brought.

There is good ground, I think, for concluding, from the evidence in the record, that this Williams suit and the proceedings under the decree of the court made therein, was a

mere expedient resorted to by Hughes to vest the title to the land in the defendant, Hyman. It appears that Hughes, in February, 1864, wrote to Richard B. Washington, executor, that he had sold this land for $15,000.00, and forwarded him a deed to execute, in pursuance of such sale. But the executor did not execute and return the deed, and this circumstance, taken in connection with the dispatch and facility with which a decree was obtained in the court, and the fact that Hughes then had in his control ample means with which to pay off the Williams debt, certainly tends cogently to prove that the proceedings in court were purely friendly and preconcerted for the purpose of effecting under their color a sale made by Hughes to Hyman which the executor had refused to ratify by executing and returning the deed; but as I do not rest my conclusions as to the merits of the case on this feature of the proof, I will not enlarge upon it.

There is no proof in the record showing or tending to show that the sum of $15,000.00, paid by defendant Hyman for the premises, was not, at the time he purchased, a fair price, and all the property was worth.

Upon these facts complainants claim the right to redeem on the ground that the sale under which Hyman claims title, was made in pursuance of the decree made in the case of Mrs. Williams against Richard B. Washington and LeMoyne, and that they were not parties to said suit, and are not bound by the decree therein or the sale made in pursuance thereof; that said sale was in all essential respects a judicial sale, and the foreclosure of said trust deed was in effect under said decree, and not solely under the contract powers conferred on Mr. LeMoyne by the trust deed; while on the part of the defendants it is insisted that the complainants were not necessary parties to the bill; that their interests were represented by the executor; and further that the executor was clothed

with such powers of sale under the will as to draw to him the fee of the land upon which his power was to operate.

The first question to be considered is, Who had the fee in the equity of redemption of this land at the time of the suit in question? The third clause of the will of John A. Washington expressly devised this land with his other real estate to his children, and I think there is no room for doubt, and hardly for argument, that these complainants held the fee in the equity of redemption when the Williams bill was filed. The bill was filed for the purpose of having an account taken as to the amount due Mrs. Williams, and secured by the trust deed, and to require the trustee to execute the trusts, and make the amount thus to be found due. The frame and scope of the bill was such that the court could appropriately have appointed a new trustee, or directed a sale by one of its own officers, a master in chancery or commissioner, in the usual form of chancery sales. The court was not necessarily bound to execute the trusts through the trustee named in the deed, if for any reason it should be held more agreeable to equity and conducive to the rights of all the parties that they should be executed otherwise. It is not what the court did do, nor the decree which was actually entered, but what the court might have done under this bill, which determines the question as to who were the proper parties thereto. The decree which was entered required the trustee to make the sale in a particular way, even directing the newspaper in which he should publish his notice, and the number of days which such notice should be published, and finally requires him to report his sale to the court, and to pay out of the proceeds of the sale the amount due Mrs. Williams, with interest at six per cent. after the date of the decree, and to pay the balance of the proceeds into court to be drawn out by Richard B. Washington, as executor. Here it will be seen are several duties

imposed on the trustee, Mr. LeMoyne, which did not arise under the trust deed.

First. He was to advertise in a particular newspaper, when the trust deed designated no special newspaper for the purpose.

2d. He was to pay Mrs. Williams, the complainant, not the principal sum due on her bond, and interest at ten per cent. as the deed required, but the amount found due by the decree and six per cent. from the entry of the decree, thus compounding the interest for such time as should intervene between the decree and sale.

3d. He was to bring the surplus proceeds of the sale into court instead of paying it over himself directly to Johnson, the grantor in the trust deed, or his assigns. He was to pay it into court to be drawn out by Richard B. Washington, executor, etc., thus judicially determining who was entitled to this surplus.

4th. He was to sell the entire tract covered by the trust deed, because the court found the interest to be an undivided one.

This is only material so far as it shows that in this decree, which we must presume was prepared by the consent of all the parties before the court, the sale was treated as a judicial sale by the court and parties, and not as a sale made exclusively under the powers of the trust deed, further than the court saw fit to adopt those powers and terms.

In this respect the case comes clearly within the case of *Swift et al. vs. Smith et al.*,[1] decided by the Supreme Court of the United States at the present term, which expressly holds that the sale in that case was a judicial sale, although conducted and made by the master in chancery of the court, who was appointed a trustee by the decree, yet at the same time, it was made according to the terms in the trust deed.

[1] 12 Otto, 442.

If this was a judicial sale, I hardly need cite authorities to show that the owners of the fee burdened with the indebtedness which the complainant sought to make out of this real estate, were necessary parties to the suit.

But it is urged that equity rule 49 dispenses with the necessity of making these devisees parties to the record. This rule reads as follows:

"In all suits concerning real estate, which is vested in trustees by devise, and such trustees are competent to sell and give discharges for the proceeds of the sale, and for the rents and profits of the estate, such trustees shall represent the persons beneficially interested in the estate, or the proceeds, or the rents and profits, in the same manner, and to the same extent as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate; and in such cases it shall not be necessary to make the persons beneficially interested in such real estate, or rents and profits, parties to the suit; but the court may, upon consideration of the matter upon the hearing, if it shall so think fit, order such persons to be made parties."

The question then in this case is, was the fee of this land vested in the executor, so as to make this rule applicable? The will certainly does not vest it in the executor by its terms, and therefore it seems to me the rule does not apply. The power with which the executor is clothed by the will is purely discretionary. The executor could not be compelled to act. He was clothed simply with the discretionary right to sell the real estate outside of the state of Virginia, and re-invest the proceeds. Until the executor exercised this discretion, to sell for the purpose of re-investment, the fee of this land remains in the children, the devisees under the will, and there is no clause or word in the will intimating that the testator intended that the executor should take the fee; when the executor saw fit to sell for the purpose of re-investment under the powers

with which he was clothed that passed the fee out of the children as in the case of a power given any agent to sell real estate under a letter of attorney from his principal.

"Mere powers are purely discretionary with the donee. He may or may not exercise or execute them at his sole will and pleasure, and no court can compel or control his discretion, or exercise it in his stead or place, if for any reason he leaves the power unexecuted. It is different with powers coupled with a trust, or which imply a trust."[1]

So in *Taylor vs. Benham*, 5 Howard, 269, the Supreme Court of the United States says: "One of the tests on this subject is, that a naked power to sell may be exercised or not by executors, and is discretionary; while an imperative direction to sell and dispose of the proceeds, as in this case, is a power coupled with a trust."

So in Story's Equity Jurisprudence, § 1070, the rule is stated in these terms: "In the nature of things there is a wide distinction between a power and a trust. In the former the party may or may not act in his discretion; in the latter a trust will be executed notwithstanding his omission to act."

But it is urged further that this sale has been ratified by the executor, by the receipt from Hughes of the proceeds of the sale made to Hyman. The answer to this seems to me to be:

1st. The executor received this money from Hughes under false statement that the property had been sold at a forced sale under foreclosure proceedings, when in fact it was a mere colorable sale consented to and managed by Hughes as the agent of Washington, and where there was no compulsion about it—a sale made simply by arrangement.

2d. The executor being only empowered to sell for the purpose of re-investment, he could not ratify a sale not made by himself under the powers, so as to bind the devisees under

[1]Perry on Trusts, Sec. 248.

the will, if they were necessary parties to the suit. The fact that the executor received the remnant of the proceeds of the property left after the sale made in pursuance of the decree of the court in that case, cannot, it seems to me, be held to ratify a sale which he had no agency in making, and which he did not pretend to make under the powers with which he was clothed.

It is further suggested that there has been undue delay in the bringing of this suit; but the proof shows that all these complainants were minors at the time these proceedings were had; that they did not learn of the fact that the property had been sold, or in any way disposed of, until 1871, at which time those who were of age, the age of 21 years, were married women, and continued such until this suit was brought. There does not seem to me, therefore, to have been any such delay in the bringing of this suit as makes this proceeding what might be called a stale proceeding within the meaning of the equity cases. It does not come within any of the limitation laws of the state of Illinois, and it seems to me it is not such a claim as should be considered stale.

The other defendants in this case, Barling, Davis and Mandell, claim a title under Hyman, and have no better standing in court than he.

Under all the facts in this case, therefore, and under the law as I think it should be applied to these facts, these complainants will be entitled to a decree allowing them to redeem these premises, upon such terms as are equitable under all facts in the case; and those terms will be:

That they shall pay the amount due on the Williams trust deed, with the interest from the time it fell due, at the rate called for by the bond. In other words, Hyman should be subrogated to the position of Mrs. Williams in the case. He should also receive six per cent. upon the balance of the money which he has paid, from the time he paid it, including

the amounts paid by him for taxes and assessments, and for permanent improvements upon the premises; Hyman accounting for all rents and profits received by him for the land, which should be deducted from the amount so found due him.

A decree will be entered accordingly.

WILLIAM R. SILL, ASSIGNEE, ETC., vs. CHARLES B. SOLBERG.

CIRCUIT COURT—WESTERN DISTRICT OF WISCONSIN—APRIL, 1881.

IN EQUITY.

1. EQUITY JURISDICTION—BANKRUPTCY—SUIT BY ASSIGNEE.—Where it was arranged between the bankrupts and another party that the assets of the bankrupts should be exclusively applied in the payment of one debt for which such other party was contingently liable, instead of applying them *pro rata* upon all the liabilities of the firm; and the assignee sought by proceedings in equity to charge such other person with the money and assets so used: *Held*, that the court of equity had jurisdiction.

2. FRAUDULENT PREFERENCE.—Such application of the bankrupts' assets constitutes a fraudulent preference within the meaning of the Bankrupt Act.

3. PREFERENCE—TRANSFER OF ASSETS TO INDORSER.—If, in advance of his liability being fixed, an indorser takes the bankrupt's property to meet the note which he has indorsed when it shall mature, or to secure himself against loss, he will be liable as accepting a preference.

C. W. Bunn, for complainant.

S. U. Pinney, for defendant.

DYER, J.—This is a demurrer to a bill in equity brought by the complainant as assignee of Wilson & Kiene, bankrupts. The bill sets out the following state of facts: On and prior to the twenty-ninth day of August, 1878, Wilson & Kiene, as copartners under that firm name, were doing business in La Crosse as retail dealers in pork, ham, lard, etc. On that day they were adjudicated bankrupts, and the complainant was subsequently appointed assignee. On the twenty-eighth day of August, 1878, the bankrupts were indebted to the La Crosse National Bank in the sum of $5,000, as the makers of a promissory note, dated May 30, 1878, payable to the order of the bank, and due August 31, 1878, and on which the defendant, Solberg, was indorser. The bankrupts were also at that time largely indebted to various other persons, and had not sufficient property to pay their indebtedness, nor did they have bankable assets with which to pay their note held by the bank, of which fact the defendant had knowledge. This being their condition on the day mentioned, August 28th, Wilson, acting for the firm, but without the knowledge or consent of his partner, sold and delivered to the defendant their entire stock in trade, alleged to be then worth $3,000, and in payment therefor took the defendant's note for $2,464.14. The defendant was at the same time indebted to the bankrupts in the sum of $1,333.16 on open account, and for this amount he then gave to the firm his note. On that day the bankrupts had in hand $494.30 in cash, and also held notes against various persons, amounting in all to $792.81, all of which defendant indorsed except one note, which, without indorsement, was bankable paper. The bankrupts, or one of them, at the request of the defendant, then took the two notes so made by him, also the notes against third parties which he had indorsed, and the cash

which they had in hand, to the bank, and took up their $5,000 note, upon which the defendant was contingently liable as indorser.

It is alleged that this payment was made for the purpose of releasing the defendant from his liability on the $5,000 note, and for his benefit, and it is further averred that all the acts before recited were done in pursuance of a fraudulent combination and arrangement between the defendant and one of the bankrupts to give the defendant a preference over the general creditors of the firm. Suitable allegations are also made of the insolvency of the bankrupts at the time of these transactions, and that the defendant had reasonable cause to believe that they were then insolvent, and knew that the transfers and payments were made in fraud of the bankrupt law; and the prayer of the bill is that the sale and transfer of the stock of merchandise to the defendant, and the payment and transfer of the assets before mentioned to the bank, for his benefit, be declared void and set aside, as between the complainant and defendant, and that he be deprived of all benefit arising to him therefrom; also that he be charged with the value of the assets so transferred and paid for his use and benefit, and be decreed to repay the same; that an account be taken of the value of the merchandise; that the defendant be charged with the excess of such value over what he paid therefor, and that he be decreed to pay the same to complainant.

The bill is demurred to on two grounds: (1) That complainant's remedy is at law; (2) that upon the allegations of the bill the complainant is not entitled to the relief he seeks.

1. It is contended by counsel for the defendant that this bill is equivalent to a declaration in an action on the case, that no discovery is sought, that no such account is needed as involves the exercise of equity jurisdiction, and that, in

short, the bill contains no allegations disclosing a necessity for resorting to a court of equity. It is provided by statute of the United States[1] that "suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law." This is merely declaratory of the pre-existing rule.[2] Many authorities were cited by counsel on the argument in support of and against the proposition that the present bill shows no grounds for recourse to equity. In the cases cited in support of the demurrer, the question of the right to equitable relief arose in various forms, and from them all this summarized statement of the law may be deduced: that whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate, and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury.[3]

The case most nearly parallel to this, cited in support of the demurrer, is *Garrison vs. Markley*, 7 Bankruptcy Register, 246, which was a bill to recover the value of a stock of goods alleged to have been transferred by the bankrupts to the defendant, a creditor, with a view to give him a preference, in fraud of the bankrupt law, and in which it was held that the remedy at law was plain and adequate, and jurisdiction in equity was therefore declined. That case, it is to be observed, involved only the recovery of the value of property which the creditor had directly received from the bankrupt. That was all there was of it, and therefore trover was a suitable and complete remedy. The present bill, as we shall see, discloses some features not present in *Garrison vs. Markley*.

In many of the cases referred to by counsel for the com-

[1] Section 723, Revised Statutes.

[2] *Parker vs. Cotton & Woollen Co.* 2 Black, 545.

[3] *Hipp vs. Babin*, 19 Howard, 271.

plainant the question of equitable jurisdiction was not directly raised, and was therefore only impliedly decided. In some of these cases, and in others where the question arose for distinct adjudication, it was sought to set aside conveyances of land, or mortgages on personal property, or transfers of securities, and none of them are directly in point as parallel cases to the present; though it would seem that *Flanders vs. Abbey* 6 Bissell, 16, is a case which, if it is to be regarded as authoritative would support jurisdiction in equity, even upon such a state of facts as existed in *Garrison vs. Markley, supra.*

Cady vs. Whaling, 7 Bissell, 430, was a bill to reach property transferred by the bankrupt to his wife, and involved the avoidance of a voidable legal title in the wife. A part of the property in controversy consisted of policies of life insurance, and the peculiar features of the case, when taken together, were such as to make it quite apparent that a recourse to equity was the only effective remedy.

None of the cases cited on either side disclose such similarity to the case made by the present bill as to make them applicable, except as they enunciate general principles. This demurrer must, therefore, be decided by applying the general rules or principles relating to equity jurisdiction to the facts alleged in the bill. If a court of equity declines to take cognizance of this case, it must be because the remedy at law is plain, adequate, and complete. Such "remedy must be plain, for if it be doubtful and obscure at law, equity will assert a jurisdiction. It must be adequate, for if at law it falls short of what the party is entitled to, that founds a jurisdiction in equity. And it must be complete; that is, it must attain the full end and justice of the case."[1] Where the transaction is attended by or has given rise to circumstances on account of which a judgment at law will fall short of doing full and complete justice between the parties, or on account

[1] 1 Story's Equity Jurisprudence, § 33.

of which there is difficulty in reaching the full merits of the case under the rules of law, or where there is even a reasonable doubt as to the remedy at law being plain, adequate, and complete, equity will always take and retain jurisdiction.[1] To these general rules may be added another, which is that if there are grounds for equitable relief as to part of the substantial matters set out in the bill, equity will take cognizance of the whole.

If the entire subject-matter of the suit consisted of the sale and transfer to the defendant of the bankrupts' stock of merchandise, the remedy at law would undoubtedly be adequate and complete; for the goods were delivered directly to the defendant. They came to his hands, and were converted by him, and trover would lie for their value. In such case it would not do to say that, because fraud was involved, the jurisdiction of a court of equity might be invoked concurrently with that of a court of law. This rule is subject to exceptions, and, in view of the exceptions, Judge Story, in speaking of cases involving fraud, states the rule in this language: "It may, therefore, be said that the concurrent jurisdiction of equity extends to all cases of legal rights, where, under the circumstances, there is not a *plain*, *adequate*, and *complete* remedy at law." So, also, it may be that, as to the debt for $1,333.16 due from the defendant to the bankrupts, and for which he gave them his note, an action at law would lie to recover the amount of that debt as if no note were given, and as if the note remained unpaid. Indeed, it seems quite clear that, if the note was given and used to enable the defendant to secure protection against his liability on the note held by the bank, and thereby to get a forbidden preference, an action at law to recover the original debt owing by him to the bankrupts would be an ample remedy, if the transaction makes him liable in any form of action. But, according to the bill,

[1] *Garrison vs. Markley*, 7 Bankruptcy Register, 246.

the alleged fraudulent purchase of the stock, and the giving of the note for $1,333.16, do not constitute the entire subject-matter of the action. It is charged, as we have seen, that certain moneys of the bankrupts, and certain promissory notes held by them against third parties, were also applied on the bank indebtedness, for which the defendant was contingently liable; and it is alleged that the appropriation of these assets was made in pursuance of a scheme entered into between the defendant and the bankrupts. This means that it was arranged between those parties that the assets of the bankrupts should be exclusively applied in payment of the one debt owing to the bank, instead of applying them *pro rata* upon all the liabilities of the firm; and the bill seeks to charge the defendant with the moneys and assets thus used, because of his alleged participation in the transaction. Is there not shown in this phase of the case grounds for equitable relief, if the defendant is chargeable in any proceeding whatever? The question, I think, must be answered in the affirmative; for it is not perceived how the defendant could be made answerable in an action at law for the alleged fraudulent appropriation of the moneys which the bankrupts had in hand, and the notes which they held against third parties. Those moneys did not come to the hands of the defendant, and so he would not be liable for them in an action for money had and received. Nor were the notes last mentioned converted by him in such manner as to enable the complainant to enforce liability in an action of trover. These moneys and notes remained all the time in the hands of the bankrupt until they were delivered to the bank to be applied in payment of the $5,000 note; and, if personal responsibility for them can be fastened upon the defendant at all, it is because the appropriation of them to the payment of the bank indebtedness was made to protect him against a contingent liability, and was therefore for his benefit, and because he was a party to the transaction. The

methods pursued to accomplish the object in view, according to the averments of the bill, were circuitous, and any liability of the defendant arising from the use made of the moneys and notes referred to is one springing from the application of equitable principles to the transaction, and only enforceable in equity. As the defendant derived the benefit he sought, by indirect and circuitous means, and not by personal appropriation or conversion of the property, the transaction can only be unravelled by a court of equity, which may, if a case is made upon the proofs, charge him in equity with the value of these moneys and notes; and this is one of the results sought to be attained by the bill. Since, therefore, under the rule before stated, equity has jurisdiction as to part of the subject-matter of the bill, it may take cognizance of the whole. The first ground of demurrer must be held untenable.

2. It is insisted, however, that the bill makes no case for relief in law or equity, and the grounds urged in support of this point are that the use made of the assets of the bankrupts was not a payment to the defendant, nor to his use, as he had not been charged with a fixed liability on the note held by the bank, and owed no one on account of the note; that the action should have been brought, if at all, against the bank, as the party receiving the payment and realizing the sole legal benefit thereof, and if the bank received the money innocently, then there was no unlawful preference. I think this view of the case made by the bill is unsound. The statute, though it does not specifically name indorsers, is broad in its terms and meaning. It provides that "if any person, being insolvent * * * within four months before the filing of the petition by or against him, with a view to give a preference to any creditor or person * * * *who is under any liability for him* * * * makes any payment, * * * transfer, or conveyance of any part of his property, *either directly or indirectly*, * * * the person

receiving such payment, * * * transfer, or conveyance, *or to be benefited thereby*, * * * having reasonable cause," [1]etc.

This language manifests an intent to prevent any evasion by indirect payments or dispositions of property. It is true that the defendant's liability on the note to the bank had not been fixed; but within the meaning of the law he was under a liability for the bankrupts. He had assumed the liability of an indorser, which was contingent at the time, and which might or might not become absolute. It was such a liability as would have supported a security passing from the makers of the note to the indorser to indemnify him against loss. The transaction, as it is set out in the bill, amounted to a scheme between the bankrupts and the defendant, whereby, in anticipation of the maturity of the note, and for the purpose of protecting the indorser against absolute liability and ultimate payment, it was arranged that through the intervention and co-operation of all the parties the assets of the bankrupts should be appropriated to the payment of the note and consequent benefit of the indorser. True, the payment was not directly to the indorser, but in equity it was equivalent to that, if the facts are as stated in the bill, and equity will look through the transaction and see if it is within the spirit and meaning of the law, if not its letter. If the defendant had taken directly the securities and assets of the bankrupts for the purpose of applying them in payment of the note held by the bank, and had so applied them, and if the other required conditions had existed as alleged in the bill, there could be no question that it would have been within the inhibition of the statute. As the case is stated in the bill, has the defendant not done what, in the consideration of a court of equity, is equivalent to that? He was under a liability for the bankrupts, and payment was so made as to relieve him from that

[1]Revised Statutes, Section 5128.

liability, and thereby benefit him; and it is not to be overlooked,—for this is a vital element of the bill—that this was done in pursuance of a scheme or fraudulent device between the bankrupts and the defendant which enured to the benefit of the latter at the expense of other creditors. Thereby he as effectually secured a preference as if the assets had been paid to him directly, and he had then personally appropriated them to the payment of the note.

In *Bartholow vs. Bean*, 18 Wallace, 635, the question was whether a payment by an insolvent, which would otherwise be void as a preference, was not excepted out of the provisions of the law, because it was made to a holder of his note, overdue, on which there was a solvent indorser whose liability was fixed; and it was held that it was not. Mr. Justice Miller, in his opinion, says that "the statute in express terms forbids such preference, not only to an ordinary creditor of the bankrupt, but to any person who is under any liability for him. * * * It is therefore very evident that the statute did not intend to place an indorser or other surety in any better position in this regard than the principal creditor; and that if the payment in the case before us had been made to the indorser, it would have been recoverable by the assignee. If the indorser had paid the note, as he was legally bound to do when it fell due, or at any time afterwards, and then received the amount of the bankrupt, it could certainly have been recovered of him; or if the money had been paid to him directly, instead of the holder of the note, it could have been recovered; or if the money or other property had been placed in his hand to meet the note, or to secure him instead of paying it to the bankers, he would have been liable." This language is plainly expressive of the view that if, in advance of his liability being fixed, an indorser takes the bankrupt's property to meet the note which he has indorsed, when it shall mature, or to secure himself against loss, he will be

liable as accepting a preference. And it would seem that if this is done by indirect and evasive methods, the result in equity must be the same as if direct means were resorted to.

In *Bean vs. Laflin*, 5 Bankruptcy Register, 333, it was held that an indorser of a note who receives none of the proceeds of the same, and whose contingent liability never becomes absolute, cannot be compelled to pay to the bankrupt's assignee the amount of the note paid by the bankrupt to the holder. But in this case the maker of the note paid it at maturity without calling on the indorser or surety, and was then carrying on his business, and so continued for a considerable time thereafter; and, moreover, the surety was not a participant in any scheme for the appropriation of the bankrupt's property to save himself from ultimate obligation to pay the note. It may be added, further, that some of the doctrine of the opinion in this case is quite irreconcilable with principles laid down in *Bartholow vs. Bean*, *supra*. As bearing upon the question under consideration, and as tending to sustain the views which have been expressed, the cases of *Ahl vs. Thorner* 8 Bankruptcy Register, 118, and *Cookinham vs. Morgan*, 5 Bankruptcy Register, 16, are not without force.

I think the bill should be answered. Demurrer overruled.

UNITED STATES *ex rel.* HENRY AMY vs. CITY OF GALENA *et al.*

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—MAY, 1881.

1. MUNICIPAL CORPORATIONS—JUDGMENTS—LIMITATION OF LIENS.—The power of the court to compel a municipal corporation to take proper steps to raise means wherewith to pay judgments against it, is not affected by a statute limiting the lien of judgments on real estate to seven years.

2. MUNICIPAL INDEBTEDNESS—REPEAL OF STATUTE.—A municipal corporation cannot plead the repeal of a law providing for the payment of its indebtedness, which was in force at the time the indebtedness was incurred.

3. COUNTY COLLECTORS—CITY TAXES—Town and county collectors so far as they are charged with the duty of collecting city taxes, will be deemed *pro tanto* city officers.

4. MANDAMUS—COLLECTION OF JUDGMENTS—ANNUAL TAX—WAIVER.—Relator recovered judgments against the city of Galena for $25,000. At the time the judgments were rendered the law gave him the right to insist upon the annual levy of a tax of one per cent. to apply upon the principal and the same per cent. to apply upon the interest of his judgments. Upon petition for a *mandamus* fifteen years after the date of the judgments: *Held*, that the court would not compel the levy and collection of sufficient taxes in one year to extinguish the whole indebtedness, and that by not enforcing his right to the annual tax, the relator waived it as to years past, and could now only require the levy of a one per cent. annual tax to apply on the principal and a one per cent. annual tax to apply on the interest, until the whole indebtedness was paid.

Petition for *Mandamus*.

Grant & Grant, for relator.

D. & T. J. Sheehan, for respondents.

BLODGETT, J.—This is a petition for *mandamus*, in which

the relator avers that on the sixteenth day of January, 1866, he recovered a judgment in this court against the city of Galena for $19,377.50 debt, and $768.82 damages, and $68.17 costs, making in all $20,214.40; that on the tenth day of July, 1866, he recovered another judgment against said city for $2,500 debt, and $150.20 damages, and $36.32 costs, making in all $2,686.52; and that on the twenty-eighth day of December, 1878, he recovered in this court a further judgment for $1,000 debt, $1,096.08 damages, and $33.05 costs; total, $2,129.13. All of which judgments he avers were upon bonds issued by the defendant city, pursuant to the powers in its act of incorporation, to enable it to make various public improvements, and for the interest which had accrued on said bonds; and that said judgments together with the interest which has accrued thereon, at the rate of 6 per cent. per annum since the rendition thereof, remain in full force and wholly unsatisfied.

That the affairs of said city are, by the laws of this state, under the management and control of the city council of said city, which consists of a mayor and board of aldermen; that by an act of the general assembly of this state, approved June 21, 1852, said city council is authorized to levy and collect a tax, not exceeding one per cent., upon the assessed value of all the taxable property of the city, in addition to a tax of one-half per cent. authorized by previous acts of the legislature of the state, which taxes shall constitute the general fund for city purposes; and that by the same act they were empowered to annually assess, levy, and collect a tax of not exceeding one per cent. on the dollar on the assessed value of all the real and personal estate taxable in said city, in addition to all other taxes levied and collected in said city, which was to be applied as follows, to-wit:

"The fund so collected shall be kept separate, and shall annually, on the first day of January, be appropriated and paid over *pro rata*, on the

funded indebtedness of said city, as it may be presented by the holders of the same, to be entered as credits upon and to that extent in extinguishment of the principal of said city indebtedness."

Which provision of law was to remain in force until the whole of the city's indebtedness, and the interest to accrue thereon, was fully paid; that by an act of the general assembly of this state, approved January 30, 1857, the said city council was authorized to levy and collect annually taxes not exceeding one per cent. on the dollar on the assessed value of the taxable property within said city, to defray the general and contingent expenses, and to constitute a general fund of the city; and by the same act the city council was authorized to levy and collect taxes not exceeding one per cent. on the dollar per annum on all property subject to taxation, to meet the interest on the debt of the city; and by an act of the legislature of this state, approved February 16, 1865, the city council was authorized to levy and collect a tax of one per cent. on the dollar per annum on all property subject to taxation, which tax, when collected, shall be set apart for the sole and exclusive purpose of paying the interest upon the public debt of the city while the same is in existence.

The relator claims that by virtue of the laws thus referred to it became and is the duty of the city council of the city to annually levy and collect taxes for the payment of the said judgments, and the interest which has accrued thereon, but states that said city council has for many years past wholly neglected and disregarded its duty in this behalf, although relator has often requested said city council to so levy and collect such tax. It is further stated that the value of the property in said city subject to taxation for the year 1879 was $589,429.

By its answer or return the respondents admit the recovery of the judgments set out in the petition, or, at least, do not deny that they were recovered as alleged, but insists that

inasmuch as no executions have been issued thereon, and no writs of *mandamus* asked for to compel the levy and collection of taxes for the payment of these judgments, that the power to enforce such judgments, by compelling the levy and collection of taxes, has ceased; that, under the revenue laws of this state now in force, respondents have no authority to collect taxes, but the taxes are to be levied by the respondents, and collected by the township and county collectors; that, by the act of February 16, 1865, the aggregate tax to be levied by the respondents in any year, on persons and property in said city, cannot exceed 2½ per cent. on the assessed value for all municipal purposes, and states that the rate of taxation for the years 1879 and 1880, to pay the necessary municipal expenses, and to pay a portion of the bonded debt and interest thereon, was upwards of 3½ per cent. upon the assessed value of the property of the city.

It is further stated in the return that the sum of $300 was levied and collected, and paid to apply on the first-mentioned judgment on the sixteenth day of January, 1870, and that the city has, since the year 1870, refunded a portion of its indebtedness of the same class as that for which relator's judgments were rendered, and has levied and collected a tax of 2 per cent. on the dollar on its taxable property, 1 per cent. of which has been applied on the principal, and 1 per cent. on the interest of its said refunded indebtedness; that some of the statutory enactments cited by the relator have since been repealed, and the power of taxation limited by subsequent legislation.

To this return the relator has filed a general demurrer, and the only question is as to whether this return presents any reason why a peremptory *mandamus* shall not issue in the case.

It is urged by respondents' attorneys that, by analogy to the statute limiting the lien of judgments on real estate to seven years, the right to enforce payment of a judgment from

a municipal corporation, by compelling the levy and collection of a tax, cannot be enforced after the lapse of seven years, but I cannot concur in this position. The duty of a municipal corporation to take the proper steps to raise means wherewith to pay judgments against them, is a continuing obligation which is not affected by the lien of the judgment on real estate, and is not in the least affected by the statute giving and limiting such lien; and, even if the lien of a judgment on real estate, from the time of its rendition, has lapsed, the right to issue an execution and levy on any property subject to execution remains. See *Stribling vs. Prettyman*, 57 Illinois, 371.

This view of the law is also further supported by the principle that no execution can issue against a municipal corporation, as was fully decided in the case of *Chicago vs. Halsey*, 25 Illinois, 595, and affirmed in *Board of Trustees of Odell vs. Schroeder*, 58 Illinois, 353, and *Village of Kansas vs. Jungten*, 84 Illinois, 360.

Showing, as these cases do, that no execution could issue against this municipal corporation, in the first instance, to enforce the collection of this indebtedness, the only remedy was to compel the levy and collection of the tax, or an order on the treasurer, if the money was already collected and in the treasury.

As to the alleged repeal or modification of the acts of the legislature of the state in regard to the levying of taxes by municipal corporations, it appears from the records of the court that the bonds on which the judgments were rendered were issued in 1855, and while the act of 1852 was in full force. The act of January 30, 1857, was merely a consolidation of the charter of 1852 and the amendments thereto into one act, and to enlarge the powers of the city authorities; but it does not purport to repeal any portion of the act of 1852 in regard to the levy of this tax not to exceed 1 per cent.

per annum, to be applied on the first of January in each year in extinguishment of the principal of the city indebtedness.

By the third section of the article on taxation it provides a tax of 1 per cent. for the payment of interest on the city debt. So that it conferred an additional power upon the city authorities beyond that delegated by the act of 1852. The act of 1865, which is referred to by relator in his petition, seems but a re-enactment of the act of 1857, so far as the tax of 1 per cent. for the payment of interest is concerned, and gives no additional or further powers to the city corporation in reference to the levying of the taxes.

In *Galena vs. Amy*, reported in 5 Wallace, 705, it is held by the Supreme Court of the United States (and that was a controversy between this same relator and the same city) that the legislature has no power to repeal, and it was not competent for the defendant to plead the repeal of a law which had been enacted and was in force, for the payment of the city indebtedness at the time the indebtedness was incurred. This applies with full force to the provisions of the law of 1852, which was in force at the time of the issue of these bonds, and which remains in force, so far as the obligation of the city to this relator is concerned, up to this time. So that I can see no escape on the part of the city from the conclusion that the law of 1852, which provided for the levy of a tax of 1 per cent. for the extinguishment of the principal of the city indebtedness, is still in force; and the law of 1857, which provided for the levy of a tax of 1 per cent. to be applied on the payment of interest of the city indebtedness, is also in force.

The change of the mode of collecting the taxes of cities, so that they are now collected by the township and county collectors, cannot affect the relator's rights. The town and county collector, so far as they are charged with the duty of collecting city taxes, must be deemed, *pro tanto*, city officers.

It therefore seems to me that the demurrer in this case must be sustained, and an order must issue for the levy and collection of the tax.

The relator claims that he should have now, by order of the court, a *mandamus* requiring the city to levy and collect, at once, taxes enough to pay the entire amount due upon these judgments, because, as he argued, the city was derelict, and has been since 1866, in not levying an annual tax, and it was therefore in the power of the court to compel them to do now in one year what they ought to have done from year to year. There is a show of plausibility in the position which the relator takes in this regard, that the city could not complain if the court should compel the levy and collection of sufficient taxes in one year to extinguish the whole indebtedness; but it is obvious, from the mere statement of the amounts of these judgments, and the fact that two of them have been accumulating interest about 15 years, that the burden of paying this entire indebtedness by one year's levy would be almost insupportable by any municipality of the size and means of the city of Galena; and I think that inasmuch as the law, as it stood at the time these judgments were rendered, gave the relator the right to insist upon the annual levy of a tax to apply upon his principal, and 1 per cent. to apply upon his interest, that he, by not enforcing that right at the time, has waived it, and now he can only insist upon what might have been done each year.

An order will therefore be made requiring the city to levy a tax of 1 per cent. to apply in extinguishment of the principal, and 1 per cent. to apply in extinguishment of the interest on the indebtedness.

FIRST NATIONAL BANK OF CHICAGO vs. MARCUS FARWELL, Collector, etc.

Circuit Court—Northern District of Illinois—May, 1881.

In Equity.

1. Taxation of National Bank Shares.—In the assessment for taxation of shares of a national bank, the shareholders are not entitled to any allowance for such of the capital and surplus of the bank as is invested in government bonds.

2. Discrimination in Assessment—Injunctions.—In order to sustain a bill to restrain the collection of taxes upon national bank shares, upon the ground of discrimination, it must be distinctly alleged that the shares are valued higher than other moneyed capital generally, and it is not sufficient to allege that such is the fact in particular instances.

Bill to restrain collection of tax.

Hitchcock, Dupee & Judah, for complainant.

Francis Adams, corporation counsel, for defendant.

Drummond, J.—The act of Congress creating national banks declares that the taxation by the different states of the shares of stock in national banking associations shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such states.[1] This is a bill filed by the plaintiff to restrain, by injunction, the collection of a tax by the defendant, for the reason, as alleged, that this provision of the statute has been violated by the assessment of the shares of stock of the plaintiff in this case.

[1]United States Revised Statutes, Section 5219.

It is stated in the bill that no allowance was made by the assessors for the amount of capital and surplus invested in Government bonds. This is answered, showing that such allowance need not be made, by the case of *VanAllen vs. The Assessors*, 3 Wallace, 573, and the case of *People vs. Commissioners*, 4 Wallace, 244. The bill alleges several cases in which a discrimination is claimed to have been made against the shares of stock of the plaintiff, as that the shares of stock of other banking associations have been assessed at less value. But it is not sufficient that other capital may in fact have been assessed differently from that of the plaintiff. In making assessments it cannot be expected that the estimates of value placed by the assessors upon the property of individuals, or of corporations, should always be the same, and the fact that there may have been differences in this respect will not authorize a party to come into a court of equity and ask for an injunction to restrain the collection of taxes. It is also alleged in the bill what was the amount of the capital stock of the plaintiff, and of its surplus, and what was the aggregate fair cash value of its shares of stock on the first of May, 1880, and what was the assessment on such value against the plaintiff according to the mode of valuation adopted by the assessor; and the bill then declares what was the capital of certain other banks, naming them, and that the assessment upon those banks was not at the same rate as that made against the plaintiff. But there is no allegation what returns were made by those banks to the assessor, nor is there any statement that the assessors knew what was the value of the stock of those banks. So that it is quite possible that the valuation named in the bill by the assessor may have been the result of mistake or misapprehension, or of wrong information.

The rule which seems to be established by the Supreme Court of the United States in cases of this sort is this: that it must appear in the act of the legislature it was the inten-

tion of the statute to tax the shares of the capital stock of the national banks at a higher rate than other moneyed capital in the hands of individuals, or there must be some agreement or combination or rule established by the assessors, the necessary effect of which is to produce the same result. It may be admitted that it is difficult, under this rule, for a party to come into a Federal Court of equity and obtain an injunction against the collection of a tax. The inclination of the Supreme Court seems to be to discourage applications of this kind, as interfering with the collection of funds which are necessary to carry on the government of the state.

In the case of *The German National Bank of Chicago vs. Kimball*, 103 United States, 732, recently decided in the Supreme Court of the United States, it appears to be implied that there must be a distinct averment in the bill that the shares of stock of a national bank are valued higher for the purposes of taxation than other moneyed capital generally, and that it is not enough to allege that such may be the fact in a particular instance; that the mere allegations that the assessments are partial, unequal, and even unjust, are not sufficient. It is, perhaps, inferable from the opinion in that case that the Supreme Court will not go further than it has already gone in the cases of *The People vs. Weaver*, 100 United States, 539; *Pelton vs. National Bank*, 101 United States, 143; and *Cummings vs. National Bank*, 101 United States, 153.

In this case there appears to have been no agreement or concert of action among the assessors by which a general rule or discriminating rate has been adopted either by the assessors generally, or by any single assessor, the necessary effect of which is to tax the shares of stock of the First National Bank of Chicago at a higher rate than other moneyed capital in the hands of individuals, and therefore the motion which has been made for an injunction will be overruled.

See, also, *Bank of Evansville vs. Britton, post*, page — 503

WILLIAM G. FARGO, Individually and as President of the American Express Company, vs. THE LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY COMPANY.

Circuit Court—District of Indiana—May, 1881.

In Equity.

1. Joint-Stock Company—Citizenship—Federal Jurisdiction.—A joint-stock company possessing the right by the law of the state where it is organized, to sue and be sued in the name of its president or treasurer, is a citizen of that state, in the same sense that corporations are citizens of the states under whose laws they are organized; and such joint-stock company may sue and be sued in the name of such officer in the Federal Courts, as a citizen of that state, without regard to the citizenship of the shareholders of the company.

2. Corporations.—If the essential franchises of a corporation are conferred upon a joint-stock company, it is none the less a corporation for being called something else.

Motion by defendant to dismiss suit for want of jurisdiction.

E. F. Trabue and *Isaac Caldwell*, for defendant, and in favor of motion, argued that: The American Express Company not being a corporation, cannot maintain a suit, nor can a suit be maintained on its behalf, as an association, under the decisions of the Supreme Court, permitting corporations to sue as citizens of their respective states. *L., C. & Ch. R. R. Co. vs. Letson*, 2 Howard, 497; *Marshall vs. B. & O. R. R. Co.* 16 Howard, 314; *Railroad Company vs. Whitton*, 13 Wallace, 283; *O. & M. R. R. Co. vs. Wheeler*, 1 Black, 286. All stockholders of the Express Company must therefore be citizens of states other than that of respondent. *Hope Ins. Co. vs. Boardman*, 5 Cranch, 57; *Bank of U. S. vs. Deveaux*,

Id. 85; *Breithaupt vs. Bank of Georgia*, 1 Peters 238; *Bank of Cumberland vs. Willis*, 3 Sumner, 472; *North River Co. vs. Hoffman*, 5 Johnson's Chancery Reports, 300; *Bank of Vicksburg vs. Slocum*, 14 Peters, 60; *Whitney vs. Mayo*, 15 Illinois, 254; *Baldwin vs. Lawrence*, 2 Simon & Stuart, 18; *Leigh vs. Thomas*, 2 Vesey, Sr. 312; *Strawbridge vs. Curtis*, 3 Cranch, p. 267; *Cameron vs. McRoberts*, 3 Wheaton, 591; *Camblos vs. Adams Express Co.* 4 Brewster. The bill must show that all stockholders are citizens of states other than Indiana. *Anderson vs. Jackson*, 2 Paine, 426; *Keeley vs. Harding*, 5 Blatchford, 502; *Wood vs. Mann*, 1 Sumner, 580; *Bank of Cumberland vs. Willis*, 3 do. 473; *Bingham vs. Cabot*, 3 Dallas, 382; *Turner vs. Enville*, 4 Dallas, 7; *Babyshall vs. Oppenheimer*, 4 Washington, C. C. 483; and other cases cited above.

Baker, Hord & Hendricks and *Sherman S. Rodgers* for complainant, argued that: The right of this joint stock company to sue and to be sued in the name of its President, is a franchise conferred upon it by the New York statutes, which, under the comity of states, is to be recognized in every state, where it does business by permission. This joint stock company, possessing all the essential artificial qualities that distinguish a modern corporation, is in fact a corporation, whatever it may be called. *Waterbury vs. Merchants' Union Express Co.*, 50 Barbour, 158: and the same presumption should be entertained that all its members are citizens of the state under whose laws it was organized. *Fargo vs. McVicker*, 55 Barbour, 438. The court will look only to the citizenship of the person who is a party to the record. *Coal Company vs. Blatchford*, 11 Wallace, 172. The New York statutes create the President of the Express Company, a corporation sole for the purpose of suing and being sued for the company. *Westcott vs. Fargo*, 61 New York, 547; *Reddish vs. Pinnock*, 10 Exchequer, 220; *Chapman vs. Milvain*,

5 do. 61; *Wills vs. Sutherland*, 4 do. 211; *Hybart vs. Parker*, 93 English Common Law, 212; *Rolfe vs. Rundle*, 103 United States, 222; *Overseers vs. Seers*, 22 Pickering, 125; *Liverpool Ins. Co. vs. Massachusetts*, 10 Wallace, 566. At all events there is no want of jurisdiction unless the Indiana stockholders are indispensable parties to this action. Story's Equity Pleadings, §§ 72 to 100. *West vs. Randall*, 2 Mason, 196; *Paye vs. Hook*, 7 Wallace, 431; *Hotel Co. vs. Wade*, 7 Otto, 13; *Horn vs. Lockhart*, 17 Wallace, 570; *Shields vs. Barrow*, 17 Howard, 130. One shareholder can sue on behalf of all. *Hichens vs. Congreve*, 4 Russell, 562: *Walworth vs. Holt*, 4 Mylne & Craig, 619; *Richardson vs. Hastings*, 7 Beavan, 323; 11 do. 17; Story's Equity Pleadings, § 107, *et seq.*

GRESHAM, J.—This is a suit in equity brought by William G. Fargo, a citizen of the state of New York, individually, and as president of the American Express Company, against the Louisville, New Albany & Chicago Railway Company for an injunction and other relief. The grounds of jurisdiction assigned in the bill are—(1) That the right of the American Express Company to sue and be sued in the name of its president is a franchise conferred upon it by the legislature of New York, which, by comity, follows it into other states where it is permitted to do business; also, that the president is a natural person and a citizen of the state of New York, and the defendant is a citizen of the state of Indiana. (2) That if it be held that the complainant, as such president, is not entitled to maintain the suit under the laws of New York, then he brings the suit, not only in his own name and behalf individually as a shareholder in the company, but also in behalf of such of the other numerous shareholders not citizens of the state of Indiana as shall come in

and be made parties to the suit, and share in the expense thereof.

The defendant's objections to the jurisdiction of the court are that the American Express Company is not a corporation, but a mere voluntary association, with no existence as an entity separate from that of its members; that, not being a citizen in the sense in which a corporation is, it can sue only in the names of all of its associates, who, upon the face of the bill, must appear to be citizens of states other than the state of Indiana; that the New York statutes, which it is claimed, authorize this suit to be brought in its present form, permit the president to sue only when all the stockholders can sue, and that all the stockholders of this company could not sue, because they are all of the same class, and some of them are citizens of the same state as the defendant; that the laws of New York, which confer upon this company certain corporate franchises, have no extra-territorial effect, and that the jurisdiction of this court is not of comity, but of constitutional right. The judicial power of the United States is extended by the Constitution to "controversies between citizens of different states," and by the judiciary act jurisdiction is conferred upon the Circuit Courts of the United States when the "suit is between a citizen of the state where the suit is brought and a citizen of another state." It is now settled that for the purposes of Federal jurisdiction corporations are regarded as citizens of the states where they are created, and no averment as to the citizenship of the members elsewhere will be permitted.

Is the American Express Company, which is a joint-stock company, organized under the laws of New York, a citizen in the same sense and for the same purpose? In chapter 258 of the laws of 1849 of the state of New York, and in subsequent amendatory acts, joint-stock companies may sue and be sued in the name of the president and treasurer when the

nature of the cause of action is such that the suit might be maintained by or against all the stockholders. Such companies are endowed with perpetual succession, dissolution not resulting from changes in membership produced by death or otherwise. A pending suit by or against the president or treasurer of the company is not abated by the death, resignation, or removal of such officers; and a judgment against the president or treasurer, as such, is not a lien upon the individual property, but execution is levied upon the property of the company only, the shareholders being liable individually after an ineffectual effort to thus collect the debt from the company. These are privileges that are not enjoyed by natural persons or partnerships. While these companies have no common seal, it is difficult, in other respects, to distinguish them from corporations. They are organized under general laws very much as corporations are now usually organized. Their stock is divided up into shares and sold on the stock boards, just as the stock of corporations is divided up and sold.

Corporations are artificial persons—ideal creatures of the state—and so are New York joint-stock companies. It is of no consequence that in the statutes under which these companies are organized they are called "unincorporated associations." In determining what such institutions really are, regard is to be had to their essential attributes rather than to any mere name by which they may be known. If the essential franchises of a corporation are conferred upon a joint-stock company, it is none the less a corporation for being called something else. Section 3, article 8, of the Constitution of New York declares that "the term corporation, as used in this article, shall be construed to include all associations and joint-stock companies having any of the powers or privileges of corporations not possessed by individuals or partnerships. And all corporations shall have the right to sue,

and shall be subject to be sued in all courts, in like cases as natural persons." It is urged, however, by counsel for the defendant that the statute which confers the right upon these companies to sue and be sued in the name of the president or treasurer relates to the remedy only, and that it can have no extra-territorial effect.

Experience demonstrated the usefulness of these institutions in carrying on trade and business, and convenience required that they should be allowed to sue and be subject to suit in the name of an individual who should represent the companies as distinct from the individuals composing them. The right of such companies to sue, and of others, including their own shareholders, to sue them, could not be acquired by agreement between the associates. In England, by an act of Parliament, a public officer is designated to represent the individuals composing joint-stock companies in the courts, both as plaintiff and defendant, and a judgment taken against him, in his representative capacity, binds only the property of the company. In New York, where the same necessity was felt for a representative of joint-stock companies in litigation both by and with them, the legislature provided that suits might be brought by and against such companies in the name of the president or treasurer. Aside from considerations of convenience, it would be a practical denial of justice to hold that such organizations, representing as they do large interests, with numerous and ever changing shareholders, can sue and be sued only in the names of all their associates, as in the case of partnerships. It is only by comity that a corporation which has been created by one state is permitted to carry on its business in other states, and there sue in its corporate name; and it is not easy to assign a reason why the same rule of comity should not apply in favor of joint-stock companies, which in character are not unlike corporations.

In 1855 the legislature of Indiana passed an act (1 Davis,

466) relating to express companies. At that time, and ever since, the express business in this state has been done by foreign companies organized as this company was. By this act it is declared that all such companies, (and clearly foreign companies are contemplated,) before entering upon business in any county in this state, shall file in the clerk's office of that county a statement of their membership, the amount of capital invested in their business, and an agreement that service of process upon any agent of the company shall be deemed good service on the company. Here was a recognition by the state of the existence of express companies like the American, with all the privileges which they enjoyed where organized, one of which was the right to sue in a representative or common name.

The legislature of Massachusetts passed a statute which imposed upon each fire, marine, and fire and marine insurance company, incorporated or associated under the laws of any government or state other than one of the United States, a tax of 4 per cent. upon all premiums charged or received on contracts made in that state for insurance of property. With this statute in force, the state of Massachusetts filed a bill in its supreme judicial court against the Liverpool & London Life & Fire Insurance Company to collect a tax of 4 per cent. upon its premiums upon contracts made in Massachusetts, and to restrain the company from doing further business until the tax was paid. Payment of the tax was resisted on the ground that the defendant was an association of natural persons, under certain deeds of settlement and special acts of Parliament, and not a corporation. In these acts of Parliament, conferring privileges on the company, it was declared not to be the intention to make it a corporation. The Supreme Court of Massachusetts gave a decree against the company.[1] In affirming the case on appeal the

[1] *Oliver vs. Liverpool & London Fire Ins. Co.* 100 Massachusetts, 531.

Supreme Court of the United States held that, as the law of corporations is understood in this country, the Liverpool & London Life & Fire Insurance Company was exercising corporate franchises in Massachusetts, and that it was liable as a corporation to pay tax under the statute of that state.[1]

In the case of *Westcott vs. Fargo*, 61 New York, 542, it was held that under section 3, art. 8, of the Constitution of New York, and under the legislation of that state, already alluded to, the president of the American Express Company was to be deemed a corporation sole for the purpose of suing and being sued in the courts of that state. The reasons which induced the Supreme Court to hold that, for the purpose of Federal jurisdiction, corporations are to be regarded as citizens of the state whose creatures they are, call with equal force for a similar ruling in favor of joint-stock companies which are organized under the laws of New York. It is no less convenient for the public than it is for these companies that they should be allowed to sue and be sued in the name of the president or treasurer. If they are not allowed the privilege of thus suing they cannot be thus sued. The American Express Company has a capital stock of $18,000,000, with more than 3,000 shareholders. Its right to sue and its liability to be sued in the name of its president or treasurer is a franchise conferred upon it by the laws of New York, which by comity should and does follow it into other states, and William G. Fargo, who brings the suit as president, is a citizen of New York, and the defendant is an Indiana corporation and a citizen of that state.

For these reasons I think the suit properly brought, and without deciding other questions which were argued by counsel, the motion to dismiss for want of jurisdiction is overruled.

[1] *Liverpool Ins. Co. vs. Massachusetts*, 10 Wallace, 576.

HORACE B. CLAFLIN *et al.* vs. STOUGHTON A. FLETCHER *et al.*

CIRCUIT COURT—DISTRICT OF INDIANA—MAY, 1881.

1. REAL PARTY IN INTEREST.—Extrinsic evidence is admissible to show who is the real party in a suit prosecuted or defended in the name of a nominal party, and the real party in interest is bound by the judgment equally as though he was a party of record.

2. REPLEVIN—RES ADJUDICATA.—Judgment in a replevin suit brought to obtain possession of goods is conclusive as to the ownership in an action between the same parties, to recover the value of the goods.

This suit was brought by Claflin & Co. against Stoughton A. Fletcher and Francis Churchman, for the value of a lot of dry goods which one George Hazard, by fraudulently representing that he was solvent, when in fact he was insolvent, induced the plaintiffs to sell to him on time.

It was averred that Fletcher & Churchman bought the goods at sale on execution against Hazard, after being notified of the latter's fraud, and that the plaintiffs had cancelled the sale and demanded possession of the property.

The defendants answered that for some time before their purchase of the goods the latter had been in the custody of John W. Cottom, Robert S. Foster, and Ellis G. Shantlin, as the agents of the defendants; that prior to the marshal's sale the plaintiffs demanded possession of the goods of such agents, who, under instructions from the defendants, refused to surrender the same; that the plaintiffs then commenced an action of replevin in the Superior Court of Marion county, Indiana, against the agents, Cottom, Foster, and Shantlin, for possession of the goods; that the defendants appeared, and in the name of their agents controverted the title of the plaintiffs to the goods; that the right of the plaintiffs to the goods was liti-

gated, and a verdict and judgment were rendered for the defendants, and that this judgment is in full force and unreversed.

After admitting in their reply that they prosecuted their action in replevin to judgment, the plaintiffs averred that the defendants in this suit were not parties to the suit in the State Court; that the suit in the latter court was not tried on its merits; that the right of the plaintiffs to the goods was not determined by that action; and that the plaintiffs failed in the State Court because they had not, prior to the beginning of their suit, surrendered or offered to surrender to George Hazard the note that he had given for the goods; for which reason the court instructed the jury to return a verdict for the defendants.

Demurrer to replication.

Gordon, Lamb & Shephard, for plaintiffs.

Rand & Taylor, and *Baker, Hord & Hendricks*, for defendants.

GRESHAM, J.—The judgment of the State Court is conclusive between the same parties and their privies. The defendants in the first suit were the agents of the defendants in this suit. Through these agents the present defendants resisted Claflin & Co.'s claim of ownership in the State Court. Extrinsic evidence is admissible to prove that a real party in a suit was not a party to the record, but that he prosecuted or defended the suit in the name of a nominal party; and whenever this is made to appear, the real party is concluded by the judgment as effectually as if he had been a party to the record. It makes no difference that the first suit was for possession of the goods while the present one is for their value. The ownership of the goods was the controversy in the State Court, and we have

the same controversy in this court. The same proof that would entitle the plaintiffs to recover here, ought to have entitled them to a verdict and judgment in the State Court. It may be that the judgment of the State Court was erroneous, but it cannot be reviewed in this collateral way. The merits were involved in the first suit, and the judgment in it is as conclusive as if it had been on the merits. The issue in that suit was broad enough to entitle the parties to introduce evidence on the merits; and if the court misapplied the law to the facts before it, the judgment is nevertheless conclusive, and it must stand until corrected in some appropriate manner.

Demurrer sustained.

UNITED STATES vs. ELEAZER AMSDEN *et al.*

District Court—District of Indiana—May, 1881.

1. Fifteenth Amendment—Right of Congress to Legislate as to State Elections.—The authority of Congress to legislate upon the right of voting at state elections, under the fifteenth amendment to the Constitution, is limited to prohibitions against discriminations on account of race, color, or previous condition of servitude, by the United States, the states, and their officers or others claiming to act under color of laws which come within the prohibition of the amendment.

2. It does not extend to punishment of individuals acting upon their own responsibility, and not under color of law.

3. Enforcement Act—Constitutional Law.—Section 5 of the Act of May 31, 1870, known as the "Enforcement Act," is not authorised by such amendment to the Constitution, and is unconstitutional and void. It lacks the essential element of discrimination on account of race, etc.

United States vs. Amsden.

Motion to Quash Indictment.

Chas. L. Holstein, U. S. District Attorney, for United States.

Thomas A. Hendricks, *Lewis Jordan* and *O. J. Glessner*, for defendants.

GRESHAM, J.—The indictment contains six counts, all based upon section 5 of what is known as the "Enforcement Act."[1] The first count charges that on the fifth day of April, 1880, an election was held under the laws of Indiana for township officers, in and for Addison township, Shelby county, Indiana; that Thomas Wilson, a colored man, was then and there a citizen and inhabitant of said township, to whom the right of suffrage was guaranteed by the fifteenth amendment to the Constitution of the United States, and a legal voter at said election; and that by threats of violence the defendants hindered, prevented, and intimidated the said Wilson from exercising the right of suffrage at said election so guaranteed to him by the fifteenth amendment. The remaining counts need not be noticed further than to say that on the motion to quash they present the same questions as the first. Section 1 of the enforcement act provides that all citizens of the United States, who are otherwise qualified, shall be entitled to vote at all elections, without distinction of race, color, or previous condition of servitude, any constitution or law of the state to the contrary notwithstanding. This section, however, provides no punishment for its violation. Section 2 provides that officers whose duty it is to afford opportunity to citizens to perform an act which by the constitution or laws of any state is made a pre-requisite or qualification of voting, who refuse or knowingly omit to furnish the required opportunity on account of

[1] 16 Statutes at Large, 140; Revised Statutes, § 5507.

race, etc., shall be punished for misdemeanor. Section 3 provides that an offer by any citizen to perform the act which is a pre-requisite or qualification of voting shall have the same effect as performance, and any judge or inspector of election who shall wrongfully refuse or omit to receive or count the vote of such citizen, when furnished by him with his affidavit showing that he has made such offer, shall be punished, etc. Section 4 provides that any person who by force, bribery, threats, intimidation, or other unlawful means, hinders, delays, prevents, or obstructs, or combines with others to hinder, delay, or obstruct, any citizen from doing any act required to be done to qualify him to vote or from voting at any election, shall be punished, etc. Section 5 reads as follows: "Section 5. And be it further enacted, that if any person shall prevent, hinder, control, or intimidate, or shall attempt to prevent, hinder, control, or intimidate any person from exercising or in exercising the right of suffrage, to whom the right of suffrage is secured or guaranteed by the fifteenth amendment to the Constitution of the United States, by means of bribery, threats, or threats of depriving such person of employment or occupation, or of ejecting such person from rented house, lands, or other property, or by threats of refusing to renew leases or contracts for labor, or by threats of violence to himself or family, such person so offending shall be deemed guilty of a misdemeanor, and shall, on conviction thereof, be fined not less than $500, or be imprisoned not less than one month and not more than one year, or both, at the discretion of the court." Section 6 provides that if two or more persons shall band together, or go in disguise on the public highway, or upon the premises of another, with intent to violate any provision of the act, or to injure, oppress, threaten, or intimidate any citizen with intent to prevent or hinder his free enjoyment of any right secured to him by the Constitution and laws of the United States, or because of his

having exercised the same, such persons shall be deemed guilty of felony.

The fifteenth amendment, which, it is claimed by the Government, authorizes the enactment of the fifth section of the "Enforcement Act," reads as follows: "Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any state, on account of race, color, or previous condition of servitude. Sec. 2. The Congress shall have power to enforce this article by appropriate legislation."

In *United States vs. Reese*, 92 United States, 214, it is held that the fifteenth amendment does not confer the right of suffrage, but it invests citizens of the United States with the right of exemption from discrimination in the exercise of the elective franchise on account of their race, color, or previous condition of servitude; that the power of Congress to legislate at all on the subject of voting at state elections rests upon this amendment, and can be exercised by prescribing punishment only when the wrongful refusal to receive the vote of a qualified elector is because of his race, etc., and that the third and fourth sections of the enforcement act are unauthorized by the fifteenth amendment, and void, because they are not confined in their operation to unlawful discrimination on account of race, etc.

The right to vote in the states comes from the states, while only the right of exemption from discrimination comes from the United States. The prohibition against discrimination is against the United States and the states, and not against individuals. The first section of the amendment is self-executing, and of its own force renders void all legislation, state or National, which discriminates against citizens of the United States on account of their race, color, or previous condition of servitude. States might, however, venture upon prohibited legislation, and it is competent for Congress to pro-

vide for the punishment of persons who, under the pretended authority of such prohibited legislation, deprive or attempt to deprive citizens of the United States of their right to vote. Undoubtedly, Congress may forbid the enforcement of all laws which abridge the rights of citizens to vote on account of their race, etc.; and further provision may be made for the adequate punishment of state or other officers or persons who assume the responsibility of enforcing such laws. But this Congress did not do or attempt to do by the fifth section. By this section punishment is declared against those who, in any of the specified ways, endeavor to prevent "any person from exercising or in exercising the right of suffrage, to whom the right of suffrage is secured or guaranteed by the fifteenth amendment." Punishment is not limited to acts of discrimination on account of race, etc., and we have already seen that the right of suffrage is not guaranteed by the fifteenth amendment. It is not an offense against the laws of the United States to prevent a citizen, white or black, from voting at a state election by violence or otherwise. A further element is necessary in such a case to subject the offender to Federal jurisdiction and punishment. The violence or other act which is resorted to must be done on account of the voter's race, etc.

In *U. S. vs. Cruikshank*, 92 United States, 542, certain counts of the indictment, which was based upon section 6 of the enforcement act, charge the "intent of the defendants to have been to hinder and prevent the citizens named, being of African descent and color, in the exercise and enjoyment of their several and respective right and privilege to vote." In delivering the opinion of the court, Chief Justice Waite said, p. 556: "Inasmuch, therefore, as it does not appear in these counts that the intent of the defendants was to prevent these parties from exercising their right to vote on account of their race, etc., it does not appear that it was their intent to interfere

with any right granted or secured by the Constitution or laws of the United States. We may suspect that race was the cause of the hostility, but it is not so averred. This is material to a description of the substance of the offense, and cannot be supplied by implication." The essential element of discrimination on account of race, etc., is wanting, both in the indictment and the section upon which it is based, and for that reason the indictment is bad, and the section is unauthorized by the fifteenth amendment.

It was a local election at which it is charged that Wilson was prevented from voting. No law of the state is complained of, and no state officer is charged with wrongdoing. The allegation is that Wilson, a colored man, and a citizen of the United States, was prevented by the defendants from exercising the right of suffrage at the township election, and that this right was guaranteed to the assailed person by the fifteenth amendment. The Federal Government can exercise only such powers as have been conferred upon it, and, however reprehensible the acts described in the indictment may be, unless they are done on account of race, etc., and under the authority of legislation which is prohibited by the fifteenth amendment, it is the exclusive province of the state to punish the offenders. The district attorney attaches importance to the language in section 5, "to whom the right of suffrage is secured or guaranteed by the fifteenth amendment," and contends that this phrase saves the section from the objection that was found to sections 3 and 4. He further insists that with proper effect given to this phrase the section means that persons who, by any of the methods therein mentioned, prevent or attempt to prevent citizens of the United States from voting at any election on account of race, etc., shall be deemed guilty of misdemeanor. Such latitude of construction is not allowable, but if it were the objection to this section would remain, that instead of being

limited in its operation to persons who act or claim to act under prohibited legislation, it provides for the punishment of individuals acting for themselves, irrespective of state laws and in states where there is no prohibited legislation. The motion to quash is sustained.

See also, *United States vs. Harris*, decided by the Supreme Court, Jan. 22, 1883, for a similar construction of this amendment.—[Reporter.

GEORGE GAUSS vs. HENRY E. SCHRADER, Assignee.

Circuit Court—Southern District of Illinois.—May, 1881.

Partnership and Individual Liability.—Where two partners signed an agreement, as individuals, to transfer certain property as security for a partnership liability, but failed to make the transfer, and subsequently became bankrupt; *held*, that such liability was not provable against the separate estate of one of the partners.

On appeal from District Court.

W. C. Kueffner, for creditor.

F. A. McConaughy, for Assignee.

Drummond, J.—Moritz J. Dobschutz and Joseph Abend were partners in business and became indebted to the plaintiff on their own note, as makers, for $4,500, upon which some payments were made leaving about $3,000 due, and on two notes given by Jackson & Browson of $3,000 each and indorsed by Dobschutz & Abend. The latter became bank-

rupts as partners and as individuals, a decree in bankruptcy was rendered against them and an assignee appointed; and the plaintiff claims that the indebtedness on the two notes which the bankrupts had indorsed was provable against the separate estate of Dobschutz. The District Court decided that it was a partnership debt and was provable, not against the separate but against the partnership estate. From this decision Gauss has appealed to this court, and in conformity with the statute has filed a statement of the case in the nature of a declaration, to which a demurrer has been interposed by the assignee, and the question in the case is whether the decision of the District Court is right, or whether it is competent for the plaintiff to prove his claim against the individual estate of Dobschutz.

The controversy mainly grows out of a contract which was made between Dobschutz and Abend and the plaintiff on the 13th of August, 1875. It seems that the bankrupts at that time were not able to pay the amount that was due to the plaintiff, either on the note of which they were the makers or on those on which they were the indorsers; and the plaintiff was willing to extend the time of payment for two years provided security were given him. There seems to be no controversy that the indebtedness on all these notes of the bankrupts to the plaintiff, was a partnership indebtedness. That is inferable from the statements contained in the declaration. The contract between the parties referred to was under seal and signed by each of them individually. It set forth that the plaintiff held these notes against the bankrupts, and it admitted that the bankrupts were responsible as well on the notes which they had indorsed as on that of which they were the makers, and it then proceeded to state that in consideration of this and to secure the plaintiff against loss, the bankrupts agreed to convey to the plaintiff, on or before two years from the date of the agreement, certain real estate which was

described. By the contract the plaintiff agreed to wait for two years on the bankrupts, and to give them that time to find a purchaser for the property, and when the property was sold he was to receive enough to pay whatever was due to him and turn over the balance to the bankrupts.

The declaration alleges that this conveyance was never made to the plaintiff. It makes no claim for any debt due on the note of $4,500, but only for the amount due on the other two notes. And it alleges that by this contract Dobschutz and Abend bound themselves individually as well as jointly, and not as partners or in their partnership name, for payment of the two $3,000 notes.

It will be seen that the agreement to convey the land was not for the purpose of payment and if conveyed it would not have operated as such, but only as security for the payment of the indebtedness, so that the effect of the failure of the bankrupts was simply that they did not give the security which they agreed to give. The result was that the plaintiff thus gave time to the bankrupts, and the character of the debt remained unchanged; it was still a partnership debt due from the bankrupts to him.

It becomes therefore a question of importance in this case, in view of the partnership and separate assets of the bankrupts and of the rights of their creditors to determine whether it is equitable for the plaintiff as against other individual creditors of Dobschutz to prove his claim against him. We have to look at the case upon general principles of equity and not as to the mere technical right of the plaintiff. It is true that this agreement between the parties was signed by Dobschutz and Abend individually, and there might be a technical liability against them for not giving the security which they had agreed to give, but as has been already said, that did not change the character of the principal indebtedness and did not make it an individual debt instead of a

partnership debt. The theory of the declaration is in accordance with this view. It does not proceed upon a possible technical liability against the bankrupts individually, but upon the original indebtedness on the two indorsed notes. The declaration alleges that while the bankrupts did not make the conveyance which they had agreed, that it would have been useless if they had, because the property which was the subject of the argument was incumbered to its full value, and therefore would not in any event have been available as a security to the plaintiff.

Looking at this case in its general scope and bearing as it appears by the facts set forth in the declaration, and considering the various equities of the individual creditors of Dobschutz, and the character of the debt due to the plaintiff, I think that the decision of the District Court was right, and that the plaintiff ought not to be permitted to prove the claim set forth in the declaration against the individual estate of Dobschutz, and therefore that the demurrer to the declaration must be sustained.

PKA-O-WAH ASH-KUM vs. EDWARD SORIN *et al.*

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—MAY, 1881.

IN EQUITY.

1. GOVERNMENT GRANT—TITLE TO LAND BEFORE PATENT ISSUES—RIGHT OF DOWER.—Where the Government agrees to grant certain land, and the land is located and surveyed and the boundaries established before the issuing of the patent, the wife of the grantee is thereby clothed with an inchoate right of dower, which becomes consummate on his death, although the patent is not issued till subsequently.

2. TITLE TO LAND IN INDIAN.—An Indian who gains perfect title to land within a state, is not exempt, nor is the land exempt, from any of the ordinary burdens and incidents which the law of the state imposes upon the owners of lands, or upon the lands themselves.

3. DOWER—STATUTE OF LIMITATIONS—INDIAN TITLE.—The defendants had been in possession of the land in controversy for more than seven years, prior to the commencement of proceedings against them, and had paid the taxes during that time. Their possession was under a claim of title from the husband of the complainant. *Held*, that the fact that complainant was an Indian woman and a member of an Indian tribe, did not prevent the Illinois statute, relative to seven years' possession under claim of title, from operating against her and barring her right of dower.

W. B. Scates, for complainant.

Hoyne, Horton & Hoyne, and *Hitchcock, Dupee & Judah*, for defendants.

DRUMMOND, J.—This was a bill filed on the 7th day of April, 1877, for the assignment of dower in fractional Section 7, T. 37 N., R. 15 E., in Cook County, Illinois. The plaintiff is an Indian woman of the Pottawattomie tribe, at present a resident of Kansas, and claims dower as the wife of Ash-kum, an Indian chief, to whom two sections of land were

granted by a treaty made on the Tippecanoe River, on the 27th of October, 1832; one of which was the section already referred to. By the third article of the treaty "the United States agreed to grant to each of the following persons the quantity of land annexed to their names, which land shall be conveyed to them by patent." Among the names mentioned is that of Ash-kum, and the quantity annexed to his name is two sections. After describing the list of persons, and the quantity of land agreed to be granted by the United States, the article closes with the following words: "the foregoing reservation shall be selected under the direction of the President of the United States after the lands shall have been surveyed, and the boundaries to correspond with the public survey." The land was selected under this treaty, and the selection approved by the President in March, 1837. A patent was not issued until November 3, 1864, and then it issued to Ash-kum and his heirs. At the time it issued, Ash-kum was dead, but there has been an act of Congress, long in force, which declares that a patent issued to a dead person shall take effect as though he were living. There have been two decisions of the Supreme Court of the United States, one of which was in a case that went up from this court, under this treaty, which have declared what was the nature of the estate taken by Ash-kum under this treaty.[1] Those cases decided that there was an estate conveyed to the reservee capable of being transferred by deed even before the land was selected or surveyed; that when selected and surveyed, and the patent issued, the patent operated so as to transfer by its terms a title to any one to whom the title had been legally conveyed by the original reservee. In *Doe vs. Wilson*,[2] the reservee died before any patent was issued; and long before

[1] *Doe vs. Wilson*, 23 Howard, 457, and *Crews vs. Burcham*, 1 Black, 352.

[2] *Supra*.

the patent had issued, the reservee, during his life, had made a conveyance by general warranty deed of the lands granted to him by the treaty; and the court decided that the person holding the grant under the reservee acquired a title by the issuing of the patent as against his heirs; and, of course, that the heirs of the reservee, as against the grant of their ancestor, acquired no title whatever, notwithstanding the issuing of the patent to him and his heirs. Substantially the same facts existed in the case of *Crews vs. Burcham*,[1] where the court made the same ruling.

Ash-kum, on the 4th of October, 1835, made a conveyance of the section in controversy in this case to Louis De Seille, by a warranty deed, a certified copy of which from the Recorder's office of Cook county, has been introduced in evidence, it not being in the power of the parties to produce the original deed. Two objections have been made to the introduction of this copy; first, that it was not properly acknowledged; and secondly, that there was no certificate of magistracy. According to the copy, the deed was acknowledged in Berrien county, Michigan, before a Justice of the Peace. The official character of the Justice of the Peace is shown by a certificate of the Secretary of State of Michigan, under the seal of the state, attached to the copy; and the certificate of a clerk of a court of record is also attached, showing that the acknowledgment was made in conformity with the law of Michigan at the time the acknowledgment was taken; and independent of such certificate, I suppose it would be the duty of this court to determine whether or not it was so executed and acknowledged. I think the copy is properly admissible under the 20th section of the statute relating to conveyances; and, therefore, that the evidence is that Ash-kum made a conveyance of his right and title to this section of land in 1835, and consequently that when the patent was

[1] *Supra.*

issued to him and his heirs, it conveyed to his grantee and his assigns under this deed of 1835 all his title to the section, and that his heirs cannot set up any claim to the land as against the deed of their ancestor.

There have been several deeds introduced on the part of the defense to show that the plaintiff has conveyed her interest in the land to different persons who were claiming the land and in possession under the title obtained from Ash-kum, and, therefore, she cannot now set up any claim for dower. One of these deeds is dated February 19, 1877, by which she conveys, in consideration of the sum of $2,000, with covenants of warranty to Benjamin S. Sooy, Stutely D. Palmer, James N. Murphy, and D. P. Elwood, the tract of land in controversy, together with the other section reserved to Ash-kum by the treaty; and there is a deed of July 5, 1877, in which the plaintiff purports to convey for a consideration of $150 all her interest in this land to Sorin, one of the defendants, making express reference to the bill filed in this case, and authorizing and directing the grantee to cause this bill to be dismissed. These conveyances thus made by the plaintiff are attacked as not having been made by her with full knowledge of the facts; and it is claimed that she was not aware of what she was signing, and therefore that the conveyances are inoperative. The proof shows that she was not able to write nor to speak English; that all communications to her in English had to be made through an interpreter. The proof is of such a character that if the case had to rest upon the validity of these deeds, there would be some difficulty in sustaining them, because it does not appear very clearly, although there is a good deal of evidence tending to that conclusion, that she did fully understand the purport and effect of the papers that she signed. I do not, therefore, think it necessary to place the decision of the court in this case upon these deeds, but rather upon other grounds.

The proof seems to show that she was married to Ash-kum by a Catholic priest as early as 1834. There is also proof showing that she and Ash-kum lived together as man and wife after their removal to Kansas, where he died in 1846. Under the law of this state, at the death of her husband, she became endowable of his interest in this section of land, she not having been a party to the deed which her husband made in 1835. The agreement to grant had been made by the United States; the land had been located and surveyed and the boundaries had been established at the time of the death of her husband. It is true the patent had not issued, but still her husband, if he had never made any grant of the land, would have been clothed with every right except what might be conveyed by the issue of the patent to him, and she was also clothed with the inchoate right of dower, which became perfect on his death. There has been possession admitted, and payment of taxes by several of the defendants under the grant from Ash-kum, and a general appropriation of the land for more than seven years prior to the filing of this bill; but it is claimed by the counsel for the plaintiff, although he has put in proof to show that the plaintiff was naturalized as a citizen by the District Court of the United States in Kansas on the 13th day of October, 1869, that she being an Indian woman is not subject to the general rules applicable to ordinary citizens; that she is clothed with special immunities in consequence of her tribal relations, she still being a member of the Pottawattomie tribe of Indians; and consequently all those laws which are applicable to the cases of possession of land, do not reach her case.

There is one expression used in the opinion of the Supreme Court in *Crews vs. Burcham*, already referred to, which might perhaps throw some doubt upon the question made by the plaintiff in this case. The language is, "it is true that no title to the particular lands in question could vest in the

reservee or in his grantee until the location by the President, and *perhaps* the issuing of the patent." It seems to me the doubt implied by the use of this language can hardly be considered as entitled to much consideration in such a case as this where the defendants claim not through another and independent title, but through the title granted by the treaty, and through the reservee named in the treaty, so that there was nothing wanting to make the title complete in the reservee or his assignee except the mere issuing of the patent. Under our law, for the purpose of asserting a right to the land, an action of ejectment or of trespass, or any other action to enforce a right which existed, was maintainable; and the issue of the patent was the mere consummation of a technical right, and nothing more. It was analogous to the common case under our law of a tract of land purchased of the United States and the money paid, and possession taken by the purchaser, under a receipt of the receiver of the Land Office or a certificate of the register, and after this has taken place, a patent issues to him. In such case, the purchaser has always been considered even before the issue of the patent as clothed with all the material rights of ownership to the land. And in the case supposed where the patent issued to him, no one else can question his prior right. It is only where there is a title independent of his in which a patent may issue to some third party for the same land, that any question can arise.

Some stress has been laid upon the fact that the plaintiff was ignorant of the tract of land which had been selected for her husband, and of her husband's rights to the particular property as well as of the issue of the patent until years after his death. I do not think this argument can be considered conclusive as against those who were in the actual possession of the land, holding under a title from her husband himself. It cannot be maintained that after a perfect title to land exists within this state by a grant to an Indian, he is exempt, or

the land is exempt, from all the ordinary burdens and incidents which the law of the state imposes upon the owners of lands. He must assert his rights against a trespasser, or a person in possession under color of title, the same as any other person. The cases which have been cited by the counsel for the plaintiff, where land belonging to the Indian tribes has been held not to be taxable under the law of the states, have no application in this case. Here the land was severed from the mass of public lands by the grant, the selection of the President, and the issuing of the patent, and the United States could make no claim that the land belonged to an Indian tribe, or to a member of an Indian tribe as such, and I think the plaintiff has lost as to the land thus in possession of the defendants all right to the maintenance of this bill for dower by the delay in the application. More than thirty years elapsed between the death of her husband and the filing of this bill. Thirteen years elapsed between the issuing of the patent and the filing of the bill. During all this time, or the greater part of it, some of this property has been held adversely under a grant from her husband. That in a case of an application for dower on the part of the widow in lands held by her husband during coverture the statute of limitations applies, is settled by several cases.[1]

The only question, therefore, is whether because she is a Pottawattomie woman, she is exempt from the operation of the general rules applicable in such cases; and whether any special disability attaches to her social and political status? I think not, and therefore I shall dismiss the bill as to these defendants thus in possession.

In giving this opinion I do not wish to be understood as deciding that some of the other defenses made in this case may not be valid; but I prefer to place the decision on the

[1] *Owen vs. Peacock*, 38 Illinois 38; *Steele vs. Gellatly*, 41 do. 39; *Whiting vs. Nicholl*, 46 do. 230; *Gilbert vs. Reynolds*, 51 do. 513.

ground of the *laches* of the plaintiff. It is difficult, for instance, to believe, in view of her husband's connection with the treaty of Tippecanoe, he himself being one of the signers of that treaty, and the fact that he made a conveyance of this tract of land long before he left Indiana and went to Kansas, that this claim was entirely unknown to his wife; but however that may be, it seems to me that when the title was conveyed by the Government, she must be placed in the same condition as any other person, and for the consequences of her acts and of her non-action where the rights of third parties are concerned, she has no special immunity.

See also, *Elwood vs. Flannigan*, 104 United States, 562, where this same title was in question, and it was held that on the issuing of the patent to the grantee after his death, the title vested in his alienee.—[Reporter.

THE PRESIDENT AND FELLOWS OF YALE COLLEGE vs. CORNELIUS RUNKLE AND OTHERS, executors, etc.

Trustees of Hamilton College vs. Same.

Circuit Court—Northern District of Illinois—May, 1881.

1. Wills—Bequest Upon Condition.—A testator by codicil to his will devised to his executors the residue of his estate for the purpose of founding an agricultural school at Knoxville, upon condition, "that before or within six months after my decease, responsible citizens of Knoxville and Knox county shall pledge at least forty thousand dollars

to the same object and purpose." *Held*, that the testator by the last clause of the above condition did not contemplate the *payment* of the whole sum of $40,000 from the citizens of Knoxville, within six months after his decease, and a valid subscription for that amount payable at a future day by responsible citizens was a sufficient compliance with the condition of the bequest.

2. VALID SUBSCRIPTIONS.—The fact that these subscriptions were not payable in full until four years from date, in view of the fact that a long time must necessarily elapse before the estate of the testator could be settled and the money to pay the bequests realized from the sale of his property, does not make the subscriptions inoperative, provided they were in other respects responsible pledges; nor are they affected by making them payable to the executors of the will.

3. IRRESPONSIBLE SUBSCRIPTIONS.—The court is of opinion, from the character of the subscriptions made, they being in small amounts, by a large number of persons of limited means, and some of them conditional, that the subscription list in question was not a pledge of $40,000 by *responsible* citizens, as contemplated by the testator.

4. CODICIL—REPEAL OF WILLS—PAYMENTS DURING LIFE.—The testator by the original will and by a codicil, after making donations to certain institutions, declared that all sums paid by him in his lifetime to such institutions should be deducted from such bequests. By a second codicil other bequests were made to the same institutions, and it was declared that by such second codicil he repealed, annulled and declared void all clauses in his will and first codicil, inconsistent with the second codicil, otherwise they were to remain in force. *Held*, that taking into view the general scope and purpose of the original will as well as the codicils, it must be considered that the testator intended that all payments made during his lifetime should be deducted from the bequests made.

The facts in these cases were as follows: James Knox, of Knox county, Illinois, died on the 8th day of October, 1876. By his will dated January 27th, 1872, he made various bequests to his relatives and friends, varying from $1,000 to $10,000 each. He also left an annuity to his sister of $1,200. He gave to the city of Knoxville, in Knox county, $2,000 in trust for specific purposes; to the Ewing Female University in Knoxville, $10,000, upon condition that a like sum should be procured within one year by subscriptions for the purpose of enlarging the university building; to Hamilton and Yale

Colleges, $15,000 each, but he "expressly provided that any donations which in my lifetime I may make to either of the three institutions of learning above mentioned, shall be deducted from the legacy and bequest in favor of such institution."

He added a codicil to his will on the 2d day of January, 1874, in which he stated that he had in the meantime given $10,000 each to the Ewing Female University, Hamilton College, and Yale College. By this codicil he gave to the Ewing Female University or St. Mary's School, at Knoxville, the further sum of $10,000 upon certain conditions, among others, that an equal sum should be pledged to the same object by other responsible parties. By this codicil he devised to his executors all the rest and residue of his estate for the founding of an agricultural school to be located near Knoxville; and he repeated the provision and condition in the original will as to payments made in his lifetime to any of these legatees. On the 12th day of January, 1875, he added another codicil to his will, in which he declared that in his opinion, the "donations" which had been made to Hamilton and Yale Colleges, and which were unpaid, could be better used in the cause of education in the Mississippi valley, and he therefore annulled the clauses in his will and codicil having reference to such bequests. By this codicil he also reduced the legacies by $1,000 each, which had been given to certain of his relations, where they amounted to more than $1,000 each, for the purpose of increasing the bequest in favor of the agricultural school. In this way, he stated, he could make additions ($31,000) for the purpose of founding and building up that school.

The bequest, together with the conditions, is in the following terms:

"And now I give, bequeath and devise to my last named executors, the survivors or survivor of them, all the rest and

residue of my estate, for the benefit of the school last referred to, but with the express condition and proviso that, before or within six months after my decease, responsible citizens of Knoxville and Knox county shall pledge, at least, forty thousand dollars to the same object and purpose. Fearing that without such moral and material aid my earnest wish and purpose will be fruitless, I hereby revoke and declare null and void all I have heretofore written in regard to the contemplated school near Knoxville, unless the said sum of $40,000 shall be pledged and subscribed as above written. If this be not done, then, and in lieu of the money I intended for said agricultural school, I give and bequeath to the trustees, and to their successors, of Hamilton and Yale Colleges, $40,000 each, in addition to $10,000 heretofore paid by me to each of said institutions."

In January, 1876, he paid to Hamilton and Yale Colleges, $10,000 each.

The provision and condition contained in the original will and in the first codicil as to payments made during his lifetime were not in terms repeated in the second codicil.

All the rest and residue of his estate he gave to the trustees of Ewing Female University. By this codicil he repealed, annulled and declared void, all clauses and provisions of the will and first codicil inconsistent with this.

The bills filed in this case alleged that the condition of the last codicil of the will has not been complied with as required by the testator; and, therefore, that the bequest to Yale and Hamilton Colleges has taken effect.

It was alleged in their answer by the executors that a subscription paper was prepared by which the subscribers promised to pay to the executors the sums set opposite their names, for the purpose of raising the required fund for carrying into effect the provisions of the will; and that subscriptions to the amount of $43,061 were made by responsible parties, which

subscriptions were payable in four installments of one, two, three and four years from January 1, 1877, and for which the subscribers agreed to give their respective notes, not bearing interest until after due, to the said executors, in trust for the said school, so soon as the amount required to secure said bequest of $40,000 had been pledged; the subscriptions were not to be held binding unless the requisite sum was pledged to secure the bequest of Mr. Knox for the school; and that a corporation had been duly created under the law, which was willing to accept and had accepted this bequest made to the agricultural school.

This corporation was made a party by supplemental bill. The controversy turned upon the fact whether there was a subscription made by responsible citizens of Knoxville and Knox county to the amount of $40,000 for the same object and purpose which the testator had in view, namely, for the founding and building up of an agricultural school near Knoxville, within the terms of the will.

E. G. Mason, H. G. Miller and T. G. Frost, for complainants.

Lawrence, Campbell and Lawrence, for defendants.

DRUMMOND, J.—I will state my opinion on some of the points made by counsel.

In order to give a proper construction to the second codicil of the will, we must take into consideration the object of the testator. He intended to aid in the founding and building of an agricultural school near Knoxville; but in order to accomplish this he seemed to think that something more was necessary than that which he contributed himself. He obviously desired that the means of others, and those residing in the vicinity where the school was to be located, should be added to his own, as well as their influence in favor of the

institution, for he says that without their moral and material aid, he fears that what he can do or wish would be fruitless. But he certainly did not contemplate the payment of the whole sum of $40,000 which he required from citizens of Knoxville and Knox county, within six months after his decease, otherwise he would have so stated. He only declared that amount should be pledged and subscribed by responsible citizens of Knoxville and Knox county; and he certainly was fully aware of the condition, or what might be the condition of his own estate at the time of his death; that it consisted, as is stated by the trustees in their answer, and as the fact appears, largely in real estate, scattered in different localities, and even in different states; that it would require possibly some years for his executors to realize on this property in such a way as to enable them to pay as well the other bequests which he had made as the particular one to the agricultural school near Knoxville, and therefore he did not deem it necessary that the money should be *paid* within the six months, but only pledged and subscribed by responsible citizens of the neighborhood. I do not think, therefore, the position taken by the counsel of the plaintiff that this money should be paid within the six months after his death, can be sustained. The work which was to be done in order to give effect to his bequest would obviously require considerable time. Buildings were to be constructed, and other preliminary measures to be adopted in order to accomplish his purpose. This, independent of the improbability of realizing so soon from his own estate the means necessary to pay the bequest, shows that it could not have been his intention to require so soon the payment of the money by the citizens who might subscribe. It, therefore, seems to me that if there was a *pledge and subscription* of the sum of $40,000 by responsible citizens of Knoxville and Knox county within six months after

his decease, that was a compliance with the condition specified in the codicil.

There is great doubt about another objection, viz: that these amounts were not payable in full until January, 1881, four years after the subscriptions were made. But in view of the facts which appear in the answer, and which do not seem to be controverted, and from the nature of the case, that such time might possibly elapse before the whole amount was to be needed to carry into full effect the purpose of the testator, I cannot say that this condition alone of the subscriptions render them inoperative; provided in other respects they were responsible pledges. Neither does the fact that these subscriptions were made payable to the executors of the will. It was not until some time after the death of the testator and the making of the subscriptions that a corporation was created to receive the proposed bequest, and therefore it was entirely competent, I think, for the parties interested in the object of the testator, and who were willing to contribute for that purpose to provide for the payment of the subscriptions to trustees of their own selection, and the fact that they were the executors of Mr. Knox ought not to render their subscriptions inoperative.

There are various other objections made to the subscriptions, as that they did not bear interest until after the amounts were due and payable according to the terms of the subscriptions, and that they were made without any consideration.

I think if it were satisfactorily established that the forty thousand dollars contemplated by the testator would certainly be available for the purpose named as soon as the funds from his own estate, or that they were so now, a court would be very much disinclined to regard with favor formal and technical objections which might be made to the subscriptions. For it would be the wish of a chancellor to give effect to the

bequest made to the agricultural school, if it could be done consistently with the condition he had prescribed.

It remains to consider therefore, the question whether or not under the evidence, these subscriptions were made by responsible citizens of Knoxville and Knox county, in the sense of the testator as required by the will.

There were about seven hundred subscribers. There were six persons who subscribed $1,000 each; six who subscribed $500 each; two $400 each; one $300; seven $250 each; four $200 each; about one hundred and seventy $50 each; and over three hundred who subscribed $25 each. The whole amount subscribed was between $42,000 and $43,000. It is admitted by the defendants that about $1,000 of the subscriptions are by irresponsible parties; but it is claimed as to the remainder that the subscriptions are good and collectible.

This clause of the will must be construed so as to carry into effect the intent of the testator as there expressed, and we have to consider what was his meaning in the use of this language: "With the express condition and proviso that within six months after my decease responsible citizens of Knoxville and Knox county *shall pledge* at least $40,000 to the same object or purpose," at the same time declaring that unless the amount was *pledged and subscribed* as above written, then instead of the money intended for an Agricultural School, the legacies named should go to Hamilton and Yale Colleges respectively.

The parties who sought to carry into effect this condition of Mr. Knox's will, appear to have circulated papers all through the county and obtained subscriptions from a large number of persons named, a great proportion of which were in small amounts, aggregating nevertheless, more than $40,000. Mr. Knox, before his death, showed by his conduct that he had the establishment of this Agricultural School very much at heart, but that he at the same time felt that it

could not be successfully accomplished without the aid of others in addition to his own, and he sought to enlist in his purpose several of the influential and wealthy men of Knox county; in which object, however, he failed. It will be recollected that the second codicil declared that the money constituting the bequests to Yale and Hamilton Colleges, made in his original will, part of which had been paid by him during his life could be better used in the cause of education in the Mississippi Valley, and for that reason he annulled the clauses in the original will and in the first codicil having reference to such bequests. And yet it appears that after he made the second codicil on the 12th of January, 1875, and before his death, he gave to each of the colleges Hamilton and Yale, the sum of $10,000. These payments were made on the 26th day of January, 1876. And notwithstanding this he left his second codicil unchanged and it so remained up to the time of his death in October, 1876.

The question may be fairly asked whether by obtaining the subscriptions in the way which has been mentioned, the purpose of Mr. Knox was accomplished as prescribed in his will. Application was not made to a few wealthy men of Knox county, as perhaps it might be claimed was contemplated by Mr. Knox, and the pledge and subscriptions made on their part to meet the condition of the will, but subscriptions amounting in number to more than seven hundred were obtained; many of these from men of small means; and it is clear from the evidence that much canvassing became necessary in order to obtain these subscriptions and long time of payment had to be given. Many were not made by the subscribers themselves, that is to say, they did not sign their own names by which they agreed to pay the respective amounts, but they were signed by other parties, as it is claimed at their request and with their consent. Some subscriptions were made upon condition and therefore were not

absolute in their character even within the terms of the subscription papers. These circumstances would undoubtedly give rise to numerous controversies if payment of these subscriptions were sought to be enforced.

While several of the witnesses state in a general way that the subscribers were responsible, it is impossible for a court, in the light of the evidence, to disregard the general character of subscriptions of this kind consisting of so many persons and of so many varying amounts. Undoubtedly a large proportion of these subscriptions were by responsible parties, but, judging from the testimony and the experience which may be presumed to be part of the knowledge of every one, and so of the court, it may be asserted with great confidence that it would not be possible at any time to collect from these subscribers anything near the nominal amount of those subscriptions. The failure of some to pay, and the expense of collecting, would prevent their reaching the amount which he designated in his will.

The subscription papers have stood, as is admitted, up to this time, in the same position that they were when they were turned over to the executors. No notes have been given, no money has been paid. It is true that these bills have been pending for the purpose of determining whether the condition of the will has been complied with, and that perhaps may be one reason why nothing has been done to make available any portion of the amount of these subscriptions. But all experience shows that even the delay which was given for the realization of the fund sought to be raised by the subscriptions, jeoparded the ultimate payment of a large part of them. So that it must be considered that there was not, within the meaning and understanding of the testator, pledged and subscribed the sum of $40,000 to meet the bequest which he made for the benefit of the agricultural school.

THE FIRST PRESBYTERIAN SOCIETY OF GREEN BAY AND THE PHŒNIX INSURANCE COMPANY vs. THE GOODRICH TRANSPORTATION COMPANY.

CIRCUIT COURT—EASTERN DISTRICT OF WISCONSIN.—MAY, 1881.

1. ACTION BY INSURER AGAINST NEGLIGENT THIRD PERSON, MUST BE BROUGHT IN NAME OF ASSURED.—At common law, where insured property had been destroyed through the negligence of a third person, and the insurer had paid to the assured the amount of the insurance, he could not sue the wrong-doer in his own name, but must bring the action in the name of the assured and owner.

2. WHERE INSURANCE WAS LESS THAN VALUE OF PROPERTY.—And though the insurance was less than the value of the property destroyed, there could not be two actions, but the liability of the wrong-doer, must be enforced in the name of the owner and assured.

3. WISCONSIN CODE ALLOWS ONE JOINT BUT NOT SEPARATE ACTIONS.—The Wisconsin code does not give the insurer the right of a separate suit, but by the payment of the insurance, he acquires the right to join with the owner as party plaintiff, in a suit to recover the whole loss against the wrong-doer.

4. REMOVAL OF CAUSES—SUIT FOR INSURANCE—CONTROVERSY.—Insured property was destroyed by a fire alleged to have been occasioned by the negligence of the defendant. The insurance covered only a part of the value of the property and was paid by the insurer to the owner. The owner, a citizen of Wisconsin, and the insurance company, a citizen of New York, joined in an action in the State Court to recover the total loss. The defendant, a citizen of Wisconsin, attempted to remove the cause to the Federal Court: *Held*, That the case did not involve a controversy which was wholly between citizens of different states and which could be fully determined between them without the presence of the plaintiff who was a citizen of the same state with the defendant, within the meaning of the second clause of section two of the Removal Act of 1875, and therefore was not removable under the act.

5. CONTROVERSY.—The fact that there are issues between the Insurance Company and the defendant, touching the issuance of the policy

of insurance, the amount of insurance, the payment thereof and the assignment of the claim, does not make out a controversy which would render the cause removable.

Motion to remand.

Cameron, Losey & Bunn, for plaintiffs.

Finches, Lynde & Miller, for defendant.

DYER, J.—This is an action brought to recover damages for the loss of a church edifice and parsonage belonging to the plaintiff society, by a fire alleged to have been negligently set by the defendant company's steamer Oconto, while she was navigating Fox River at Green Bay. The plaintiff insurance company was an insurer of the property, and has since paid the loss to the extent of the insurance, which was $5,000, and to the extent of such payment has become subrogated to the rights of the society. The entire loss is alleged to have exceeded the amount of the insurance in the sum of about $4,400, and the plaintiffs join to recover the total loss.

The action was commenced in the State Court, and removed to this court under the Removal Act of 1875, at the instance of the defendant. The plaintiffs move to remand, and this is the motion now to be determined.

The plaintiff society and the defendant company are corporations within this state. The plaintiff insurance company is a corporation of the state of New York. In the petition for removal it is stated that there is a controversy between the parties, which is of such character that a final determination thereof can be had as to the plaintiff society and the defendant without the presence of the plaintiff insurance company, and which is also of such character that a final determination thereof can be had as between the plaintiff insur-

ance company and the defendant, without the presence of the plaintiff society.

The complaint alleges the destruction by fire of the church and parsonage buildings belonging to the plaintiff society; that the fire was caused by sparks emitted from the defendant's steamer, and resulted from the defendant's negligence; that the total loss was $9,457.23; that at the time of the loss the plaintiff society held a policy of insurance issued by the plaintiff insurance company, insuring the property to the extent of $5,000; that the amount of the insurance was duly paid, and that the plaintiff society thereupon made to the plaintiff insurance company an assignment of its claim against the defendant by reason of the loss, to the extent of the insurance paid, and judgment is demanded for the full value of the property destroyed.

If the removal of the case to this court can be sustained at all, it must be under the second clause of section two of the act of 1875, which is as follows: "And when in any suit mentioned in this section, there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy, may move said suit into the Circuit Court of the United States for the proper district."

The disposition of the present motion involves an inquiry into the nature of the plaintiff's cause of action. It has been long settled both in England and in this country, that such a cause of action is single and indivisible, and that in a case like the present, the insurer could not at common law sue the wrong doer in his own name to recover the amount paid to the assured, but must bring his action in the name of the assured.[1]

[1] *London Assurance Company vs. Sainsbury*, 3 Douglas, 245; *Mason vs. Sainsbury*, 3 Douglas, 61; *Yates vs. Whyte*, 3 Bingham's New Cases,

In *Peoria Ins. Co. vs. Frost*,[1] Lawrence, J., speaking for the court, says: "It very often happens that valuable property is insured in several companies at the same time. If the property is burned through the carelessness of some third person, can such person be liable to as many suits as there are insurances? Is there more than one cause of action against him? And can that be definitely divided? What is the measure of damages? Is it the injury done by him to the property, or the amount the insurance companies have paid? Clearly the former. If the several insurance companies have paid more than the actual loss, they cannot make him liable for what they have paid. He is liable to the owner of the property for the injury he has done to it, and although a wrong doer, it is still his right to have that loss adjusted in a single suit. The companies may unite in bringing an action for their use in the name of the assured. The recovery will be for the injury done to the property, and when the judgment is obtained the court will determine, as between the different companies, how the proceeds of the judgment are to be divided."

In *Hall & Long vs. Railroad Companies*, 13 Wallace, 370, it was held, that an insurer of goods destroyed by fire in course of transportation by a common carrier, is entitled, after payment of the loss, to recover what he has paid by suit in the name of the assured against the carrier. And in the opinion it is said that "In respect to the ownership of the goods and the risk incident thereto, the owner and the insurer are considered but one person, having together the beneficial right to the indemnity due from the carrier for a breach of his contract or for non-performance of his legal duty."

272; *Hart et al. vs. The Western R. R. Corporation*, 13 Metcalf, 105; *Rockingham Mut. Fire Ins. Co. vs. Bosher*, 39 Maine, 254; *Conn. Mut. Life Ins. Co. vs. N. Y. & N. H. R. R. Co.*, 25 Connecticut, 270; *Peoria Ins. Co. vs. Frost et al.*, 37 Illinois, 333.

[1] *Supra.*

In *Connecticut Fire Ins. Co. vs. Erie Railway Co.* 73 New York, 399, it was held that the action was rightfully brought in the name of the insurer alone; but the fact was that the owner had fully settled his personal claim against the defendant, and so the insurance company was the only remaining party in interest. The action being one under the code of that state which required suit to be brought in the name of the real party in interest, and the owner having no interest, it was held that the insurance company might sue.

In this state it has been decided, *Swarthout et al. vs. The C. & N. W. Railway Co.*, 49 Wisconsin, 625, that where the owner of property destroyed by fire, and several insurers, have rights of action for different portions of the value, all arising out of the same wrongful act, they may join in a single action against the wrong doer. And it appears to be the view of the court, that under the state code, the insurer, on payment of the loss insured against, may sue in his own name. At the same time however, the court characterizes the act of the wrong doer as a single wrongful act, giving rise to but one liability upon a claim which is indivisible, and it seems to be upon this ground that the court puts the right of the insurers and the assured to join in a single action to recover the whole loss. For it is said, that "to hold that these plaintiffs cannot * * * unite in one action to enforce what is really but one liability or cause of action, but that each must bring a separate suit, would open the door to a litigation which would be most oppressive to the defendant, and which would produce much mischief."

In *Ætna Ins. Co. vs. H. & St. J. R. R. Co.*, 3 Dillon, 1, it was said by Judge Dillon, that in a case where the property destroyed exceeded in value the amount insured, the rule of law has been long settled, that the insurance company on the payment of the loss cannot sue the wrong doer in its own name; and he decided that "the suit, though for the use of

the insurer, must be in the name of the person whose property was destroyed. The wrongful act was single and indivisible and gives rise to but one liability." And he so held notwithstanding the provision of the Missouri statute which requires every action to be prosecuted in the name of the real party in interest. Upon this point he says: "However it might be if the amount paid by the insurer had equaled or exceeded the value of the property, and the assured had made a full assignment, it is plain that this case falls within all the reasons of the rule itself as expounded by Buller and Mansfield in the case in Douglas, * * * and which is the foundation of the law on this subject."

From what has been said, the conclusion follows that where the negligent act, in a case like the present, is one and indivisible, there really arises but one liability or cause of action. At common law this liability would have to be enforced in the name of the owner of the property. Admitting that under the code the insurer's right in certain cases might be enforced by action in his own name, such rule of practice or form of remedy would not have the effect to sever the original cause of action. It would effect only the manner of bringing suit. Since the code, as before, the insurer could acquire not a new and separate cause of action, but a right or interest with the owner of the property in a single cause of action or liability already existing. The act of the defendant here gave rise to but one liability, if any. The owner of the property and the insurer have joined to recover the whole loss, as they may properly do, and the character of the cause of action being as stated, the question is, Does the whole record show such a controversy arising wholly between the defendant and the plaintiff insurance company as makes the case removable within the meaning of the provision of the act of 1875, before quoted? The cause of action being a joint one, and the plaintiffs joining to recover for the loss,

what is the real controversy between the parties? What is the controversy which must be determined in order to determine the suit? Plainly, it is the question whether or not the property of the plaintiff society was destroyed by a fire caused by the negligence of the defendant, and the amount of the loss. It is the question of liability for alleged negligence and the extent of such liability, if any exists. That is the real controversy. Much dispute has arisen as to the meaning of the provision of the statute which declares that "when in any suit * * * there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them," the case may be removed; and perhaps some of the decisions, which are fast becoming multitudinous, are somewhat inharmonious.

Authorities are not wanting which strongly support the proposition that the controversy between parties who are citizens of different states, must be one which is so far the real and substantial controversy in the case, that when it is determined, the suit will be determined.[1] However that may be, I think it cannot be said of the case at bar that there is a controversy which is wholly between citizens of different states. The cause of action being single, and the plaintiffs being joint parties in interest in the prosecution of the suit, the controversy is as much between the defendant and the plaintiff society as between the defendant and the insurance company. And therefore, the controversy is not so completely between citizens of different states that when the questions on which they are opposed are decided, the whole controversy between the real adversary parties will be thereby determined.[2]

On the argument it was contended that as by the answer

[1] *Carraher vs. Brennan*, 7 Bissell, 497; *City of Chicago vs. Gage*, 6 Bissell, 467, Dillon on Removals, 3d Ed., § 25.

[2] Dillon on Removals, *supra*.

of the defendant, issues are raised touching the issuance of the policy of insurance by the plaintiff insurance company, the amount of the insurance, the payment thereof and the assignment of the claim of the plaintiff society to its co-plaintiff to the extent of the insurance, the questions thus raised make a controversy between the plaintiff insurance company and the defendant, in which the plaintiff society is not interested. But those, I think, are rather branches or incidents of the actual controversy, than the vital issues which constitute the controversy. And moreover, it is more than questionable whether they are questions in which the plaintiff and defendant who are citizens of different states are alone interested.

Cases having a bearing upon the question of the right of removal as it arises in the case at bar, are: *Merchants' Nat. Bank vs. Thompson*, 4 Federal Reporter, 876, and *Bailey vs. The New York Savings Bank*, 18 Blatchford, 77.

On the whole, my opinion is, that there is not presented here, within the meaning of the second clause of section two, of the act of 1875, a controversy which is wholly between citizens of different states, and which can be fully determined as between them without the presence of the plaintiff, who is a citizen of the same state with the defendant.

Since the foregoing opinion was written, the decisions of the Supreme Court of Wisconsin, in *Pratt vs. Radford*[1] and of the Supreme Court of the United States in *Barney vs. Latham*,[2] have been promulgated. In the first named case it is held that in a suit like that at bar, the insurance company and the owner of the property must join in bringing the action as having a united interest in the cause of action, and in the recovery sought. The decision in *Barney vs. Latham* does not, as I conceive, affect the conclusion reached in the

[1] 52 Wisconsin, 114.
[2] 103 United States, 205.

present case, because here there is no such separable controversy between citizens of different states as brings the case within the principle and scope of that decision.

Motion to remand granted, and order accordingly.

NOTE.—CONTROVERSY.—To determine whether the suit involves a controversy which is wholly between citizens of different states, the court will classify the parties according to their actual interests. *Sayer vs. LaSalle & Peru Gas Light and Coke Co.*, 9 Bissell, 372; *Burke vs. Flood*, 6 Sawyer, 220; *Removal Cases*, 100 United States, 457. And if there is such a controversy, either one or more of the plaintiffs or defendants actually interested therein, may remove the entire suit. *Barney vs. Latham*, 103 United States, 205. Such controversy must exist when the petition is filed. *The Chicago, etc. R. R. Co. vs. Macomb*, 17 Blatchford, 371. And if it appears to the court at any time that the suit does not involve a removable controversy, it will be dismissed or remanded. *Ryan vs. Young*, 9 Bissell, 63.

The controversy must consist of a separate and distinct cause of action in respect to which all the necessary parties on one side are citizens of different states from those on the other. *Hyde vs. Ruble*, 104 United States, 407. But a defendant who is a proper, though not an indispensable, party to the controversy, will not affect the right of removal. *Barney vs. Latham*, 103 United States, 205. A removal of one of the controversies in a suit takes the entire suit. *Farmers' L. & T. Co. vs. C., P. & S. W. R. R. Co.* 9 Bissell, 133; *Barney vs. Latham, supra.* It is not necessary that there should have been an answer or demurrer filed before removal, in order to create a controversy. *Bailey vs. American Central Ins. Co.* 2 McCrary, 413; *contra, Stanbrough vs. Griffin*, 52 Iowa, 112.

If judgment has been rendered against some of the defendants and appeal taken in the State Court, the other defendants cannot remove the cause then, for the controversy is an entire thing and cannot be removed at all unless removed as to all. *Mooney vs. Agnew*, 2 McCrary, 89.

A proceeding to condemn land for railroad purposes under the right of eminent domain, is a suit of a civil nature, and is removable. *Warren vs. Wisconsin Valley R. R. Co.*, 6 Bissell, 425; so also, an action by an alleged legatee under a lost will, to establish the will. *Southworth vs. Adams*, 9 Bissell, 521. In an action for a tort, the controversy is between the plaintiff and all of the defendants, and a part of them cannot remove, though part may have been sued separately. *Tuedt vs. Carson*, D. Minnesota, 1882, per Treat, J., 13, Federal Reporter, 353.

And where the defendants under a state statute call in warranty other parties, the controversy is still between the original defendants and the

plaintiff. *Ellerman vs. New Orleans, etc. R. R. Co.* 1 Woods, 120. Garnishees in an attachment suit are not parties to the controversy between the plaintiff and the defendant. *Cook vs. Whitney*, 8 Woods, 715, and the controversy between them and the plaintiff, as to their indebtedness to the defendant in the principal action, is only incidental, and is not removable. *Pratt vs. Albright, post*, page — 511

Where the widow sues a bank to recover money deposited by the deceased, and which the executor claims, joining the executor as defendant, the bank is an indispensable party to the controversy between the widow and executor as long as it holds the money. *Bailey vs. New York Savings Bank*, 18 Blatchford, 77. If several attachment creditors are joined as defendants in a replevin suit, the controversy as to the ownership of the property, involves all of the defendants. *Temple vs. Smith*, 2 McCrary, 226. In a suit by a town against certain state and county officers and the holders of its bonds, to restrain the collection of taxes for their payment, and to declare them void, the real controversy involves only the town and the holder of the bonds. *Aroma vs. Auditor*, 9 Bissell, 289; *Harter vs. Kernochan*, 108 United States, 562.

Where a bondholder has filed a bill in a foreclosure suit against a railroad company and some of its officers and other defendants, creditors, etc., involving the validity of the mortgage and charging fraud by the officers, there is a controversy wholly between the complainant and the company and its officers. *Osgood vs. Chicago, D. & V. R. R. Co.* 6 Bissell, 331; but a subsequent incumbrancer cannot remove the cause. *Donohoe vs. Mariposa Land Co.* 5 Sawyer, 163; neither can an intervening creditor who claims that nothing is due under the mortgage, and seeks to charge the property with the payment of his judgment. *Chicago vs. Gage*, 6 Bissell, 467.

In a suit to enjoin the foreclosure of, and to set aside, a trust deed, and cancel the notes thereunder on the ground that they have been paid, the controversy is wholly between the mortgagor and the holder of the notes and the citizenship of the trustee has no effect. *Chester vs. Wellford*, 2 Flippin, 347; but in case of a bill to remove cloud from title, the holder of the adverse legal title is an indispensable party. *Steinkuhl vs. York*, 2 Flippin, 376; so where the suit attacks the validity of a trustee's sale under a trust deed, and seeks to redeem, the trustee is a necessary and not a formal party. *Evans vs. Faxon*, 11 Bissell; and, also, if the complainant claims to have rights superior to those of the trustee, and the holder of the notes, and seeks to subordinate the latter. *Mitchell vs. Tillotson*, per Harlan J., to appear in 11 Bissell; and in a suit to set aside a will, where the will provides that the executors shall take a certain sum in trust, and pay the proceeds therefrom as indicated, the executors are indispensable parties to the controversy. *Price vs. Foreman*, per Harlan J., to appear in 11 Bissell. And when the bill is filed

to enforce specific performance of a contract for sale of land and charging that the land has since been fraudulently conveyed, there is only one controversy, to which both defendants are parties. *Tyler vs. Hagerty*, 2 Flippin, 257; but if a creditor's bill charges that the judgment debtor fraudulently conveyed one piece of property to A, and another piece to B, there is a removable controversy between A and the complainant. *Sheldon vs Keokuk Northern Line Packet Co.* 9 Bissell, 307. Under a bill to establish title, if there are several defendants each claiming under a separate title, and the court is empowered under the state statutes to decide which one has the real and true title, they are all parties to one controversy. *Carraher vs. Brennan*, 7 Bissell, 497. And mortgagees under an adverse title cannot remove a suit to remove cloud from title. *Steinkuhl vs. York*, 2 Flippin, 376. An incidental controversy which has arisen during the progress of the suit in the state court cannot be removed. *Ellis vs. Sisson*, to appear in 11 Bissell; nor can a controversy between a contractor and a receiver appointed by the state court. *Buell vs. C., E. & Q. Construction Co. post*, page —— 555

See also, Reporter's note to *Sheldon vs. Keokuk Northern Line Packet Co.* 9 Bissell, 307.—[Reporter.

JOHN HEERMANS vs. FREDERICK SCHMALTZ *et al.*

CIRCUIT COURT—EASTERN DISTRICT OF WISCONSIN—MAY, 1881.

1. CREATION OF EXPRESS TRUSTS—WISCONSIN STATUTES.—A conveyance of lands in trust to rent and sell the same and pay the proceeds to the grantor during his life, and after his death, to certain other persons named in a supplementary writing, will create a lawful trust, under the fifth subdivision of section 2081, Revised Statutes of Wisconsin.

2. CONSTRUCTION OF SUPPLEMENTARY INSTRUMENT.—The original conveyance and supplementary writing will be construed together as one instrument.

3. DEFINITENESS OF TRUST—DESIGNATION OF CLASS.—The fact that part of the beneficiaries are designated as a class, instead of naming them individually, will not render the trust void, on the ground that the trust is not fully expressed and clearly defined.

4. Distinction between Wisconsin and New York statutes concerning trusts considered.

5. TITLE BY ADVERSE POSSESSION.—In order to gain title by adverse possession in Wisconsin, the party must have had possession under a claim of title, whether founded upon a written instrument or not, exclusive of any other right.

6. PRESUMPTION.—Evidence of adverse possession is always to be construed strictly, and every presumption is to be made in favor of the true owner.

7. SAME—ENTRY UNDER CONTRACT—ESTOPPEL.—A party who enters into possession of lands under a contract to purchase, is estopped from asserting a paramount title by adverse possession, unless there has been express notice to the vendor of an intention to claim adversely, or a surrender of the possession flowing from the original entry, prior to the time of the adverse possession beginning to run.

7. EVIDENCE—VERBAL ADMISSIONS—ADMISSIBILITY AFTER DEATH.—Verbal admissions by the adverse claimant that he entered into possession under a contract, and that he had never paid anything on the same, are not rendered inadmissible in evidence after his death, by sections 4069 and 4070, Revised Statutes of Wisconsin.

Jenkins, Elliott & Winkler, for plaintiff.

Howard & Wall, for defendants.

DYER, J.—This is an action of ejectment, to recover the possession of 140 acres of land in Milwaukee county, occupied by the defendant Schmaltz, as lessee of the defendant Merrick, who claims ownership in hostility to the title of the plaintiff. The defense consists of a denial of the plaintiff's title, and a claim of adverse possession for a period of 20 years, which possession is also asserted for a period of 10 years under claim of title founded upon a deed from one Ellis Worthington to Levi J. Merrick, father of the defendant Levi C. Merrick.

The case has been tried without a jury, the parties having stipulated to submit it to the court. By regular chain of conveyances from the Government, the plaintiff proved title in one Joseph Fellows, the plaintiff's grantor, now deceased. By deed of trust executed October 10, 1868, Fellows conveyed the premises in question, and other lands in Pennsylvania and other states, to the plaintiff; the granting clause in the deed, with its provisos, being as follows:

Now, therefore, I, the said Joseph Fellows, in consideration of the premises, also of one dollar to me paid by the said John Heermans, the receipt whereof is acknowledged, have sold, and by these presents do grant, release, and convey unto the said John Heermans, his heirs and assigns, forever, all my real and personal estate situated in the several states aforesaid, to have and to hold the same unto the said John Heermans, his heirs and assigns, forever; *provided*, always, that the said John Heermans shall sell the said granted lands by retail for the best prices that can be got for the same, and convey the same in fee simple to purchasers, with covenants of warranty binding my heirs to warrant and defend the titles to the lands so to be sold and conveyed; and, until the said lands shall be sold as aforesaid, he shall rent such of them as can be rented for the best prices that can be got. He shall collect all debts owing to me, and execute deeds as aforesaid for all lands now under contract of sale, on the payment of debts owing on them, respectively. The avails of the said real and personal estate shall be paid, distributed, and disposed of as follows: *First*, to defray the expenses of this trust, to-wit: 5 per cent. commission on all money received and paid out, and all

necessary and reasonable expenditures in and about the execution of the trust, including local agencies; *secondly*, during my life the residue of all moneys received shall be paid over to me, or appropriated to my uses under my direction; *thirdly*, after my decease, and after the payment of all my just and legal debts and the expense of the trust as aforesaid, the residue shall be distributed as directed in a writing supplementary to this deed, to be executed by me hereafter; or in case that such writing shall not be executed, then the said residue shall be distributed to my heirs according to the laws of the state of New York.

By a supplementary instrument in writing, executed October 15, 1868, Fellows directed the avails of his property and certain real estate to be distributed and conveyed, after his decease, among certain relatives named, in certain specified proportions, with further directions that the shares of such of the residuary shareholders as should die before his decease should be distributed among their children, respectively, according to law. These instruments were executed in the state of New York, where Fellows resided, and where he died on the twenty-ninth day of April, 1873. On the part of the defendants, proof was made of a bond for a deed, dated January 26, 1857, from Fellows, by E. Worthington, his attorney, to Levi J. Merrick, by which Merrick agreed to pay $3,500 for the land, $1,000 of which was to be represented by a note for that amount, payable September 1, 1857, with 10 per cent. interest, and the balance was to be secured by note and mortgage bearing 7 per cent. interest, and payable January 25, 1860.

As a further basis of title, the defendant put in evidence a warranty deed of the premises in question from Ellis Worthington and wife to Levi J. Merrick, executed May 1, 1857, but not recorded until May 18, 1865. This was followed by proof of a deed from Levi J. Merrick to the defendant Levi C. Merrick, executed May 8, 1878, and a lease from the defendant Merrick to the defendant Schmaltz, executed April 30, 1879. Proof was also made of the execution of a lease of a portion of the premises, dated November 19, 1858, from Levi

J. Merrick to one John Cappon, for the term of five years. Certain other documentary evidence in support of the defendants' claim of title was introduced, consisting of a mortgage deed of 20 acres of said land, executed by Isaac Cappon and wife to Levi J. Merrick, November 23, 1866; a contract for a deed of the whole of the premises in question, dated October 12, 1874, from Levi J. Merrick to Casper Traxel and the defendant Schmaltz; and a release of said premises by the Bank of Milwaukee, executed August 11, 1857, from the alleged lien of a judgment recovered July 1, 1857, by the bank, against Ellis Worthington. Proof was also made of possession of the premises by Levi J. Merrick, and those claiming under him, as hereafter more fully stated.

The first question which arises is, what interest or title, if any, was vested in the plaintiff by the instrument of conveyance from Fellows to him, executed October 10, 1868, in connection with the supplementary instrument of date October 15, 1868? It is claimed by the plaintiff that this conveyance is a valid deed, conveying the premises to the plaintiff as trustee of an express trust, and vesting the legal title in him. On the other hand, the validity of this instrument is attacked on the ground that, if it has any force whatever, it can only be considered a power in trust, created for the benefit of the donor during his life; that as it provides for the disposition of the residue of the property after his death, it could, on the happening of that event, only take effect as a will; that no valid trust is created either under the New York or Wisconsin statute of uses and trusts; that whatever trust was declared, lapsed on the death of Fellows, and did not survive him; that the granting clause in the conveyance, by which the fee is attempted to be conveyed, is repugnant to the other parts of the deed; and therefore that the plaintiff has no such interest or title as enables him to maintain this action. The statute of Wisconsin in force when this convey-

ance was executed, and now known as section 2081 of the present Revision, provided as follows:

> Express trusts may be created for any or either of the following purposes: (1) To sell lands for the benefit of creditors; (2) to sell, mortgage, or lease lands for the benefit of legatees, or for the purpose of satisfying any charge thereon; (3) to receive the rents and profits of lands, and apply them to the use of any person during the life of such person, or for any shorter term, subject to the rules prescribed in the last preceding chapter; (4) to receive the rents and profits of lands, and to accumulate the same for the benefit of any married woman, or for any of the purposes and within the limits prescribed in the preceding chapter; (5) for the beneficial interests of any person or persons, when such trust is fully expressed and clearly defined upon the face of the instrument creating it, subject to the limitations as to time * * * prescribed in this title.

It is understood that this is a literal copy of the New York statute, except that the fifth subdivision has been added in this state, and is not found in the statute of New York. The instrument of conveyance in question has received the attention of the courts of New York in litigation arising thereon in that state, in *Heermans vs. Robertson*, 64 New York, 332; *Fellows vs. Heermans*, 4 Lansing, 230; *Young vs. Heermans*, 66 New York, 374.

In *Heermans vs. Robertson, supra*, the fact was, that after the execution of the trust conveyance from Fellows to Heermans, Fellows sold to Robertson a portion of the lands embraced in the trust deed. Robertson went into possession under his contract of sale, and after Fellows' death Heermans brought ejectment to recover possession of the land. The court held that, conceding the plaintiff in the action became seized under the trust conveyance of an estate in the lands in trust for leasing, with power of sale, as Fellows was entitled to receive to his own use all receipts from sale during his life, and as he could have compelled an execution of the trust by a sale, he having made a sale, instead of resorting to a court of equity for that purpose, thus accomplishing the same result, Robertson, not being in default, was in equity entitled

to hold the premises as against the plaintiff. Two of the judges place their judgment expressly on the ground that, under his contract with Fellows, Robertson established an equitable defense to the action. Three of the judges, go further, and hold that no express trust was created by the instrument to come into effect at the death of Fellows; and, although they do not decide the point, strongly indicate it to be their view that no express trust is declared in the instrument for any of the purposes for which, by the law in New York, such trusts may be created. Earl, J., dissented, and was of the opinion that the conveyance vested in Heermans the legal title upon a valid trust.

In *Fellows vs. Heermans*, *supra*, it was held by the Supreme Court of New York, one of the judges dissenting, that if the provision in the deed of October 10th, with regard to sale of the lands, was inoperative as a trust, the provision for renting the lands and applying the avails would, nevertheless, stand as a valid trust to receive the rents and profits; and, further, that the conveyance contained a valid power in trust.

It is to be borne in mind that these decisions are based upon a construction of the statute of New York, and although the opinions of the judges indicate that they had many doubts as to the operative effect that should be given to the conveyance in question, I think it a fair deduction from the decisions that, in New York, this instrument could not be upheld as declaring an express trust for any of the purposes for which, by the law of that state, such trusts can be created. And, in considering the question here, my opinion is that support for this conveyance must be found, if at all, in the fifth subdivision of the statute of this state, which is not contained in the New York statute, and which authorizes the creation of an express trust "for the beneficial interests of *any person or persons*, when such trust is fully expressed and clearly defined

upon the face of the instrument creating it." Touching this clause in the Wisconsin statute of uses and trusts, Chief Justice Dixon, in *Goodrich vs. The City of Milwaukee*, 24 Wisconsin, 430, says—

"It is not found in the statute of New York, and first appeared in this state in the Revised Statutes of 1849. The addition of that subdivision to the four which precede it, and which are found in the statute of New York, establishes, as it was undoubtedly intended to do, a policy in this state upon the subject of active trusts entirely different from that which prevails in the state of New York. It shows very clearly that *no active trusts were intended to be affected or abolished by any provision of the statute*, though the language of some of its sections, literally construed, may be broad enough to include them; but that *any such trust* may still be created, when, in the language of subdivision five, 'it is fully expressed and clearly defined upon the face of the instrument creating it.'"

It follows, therefore, that if this provision of the Wisconsin statute authorizes such a trust as is created by the conveyance in question, the decisions in New York before cited are inapplicable. Does the conveyance declare an express trust of a nature covered by this subdivision of the statute? It is a conveyance for a specified consideration to the plaintiff, Heermans. It directs the grantee to sell the lands by retail, with covenants of warranty. It provides further that until sale such part of the lands as the grantee can rent shall be rented for the best prices obtainable. It contains a direction to collect the grantor's debts, and finally provides that the avails of the estates, real and personal, shall be paid and distributed: *First*, to defray the expenses of the trust; *secondly*, to pay to the grantor during his life, or to appropriate to his use, under his direction, the residue of all moneys received; and, *thirdly*, after his decease, and the payment of his debts and the expenses of the trust, to distribute the residue as directed in a writing supplementary, to be thereafter executed, or, in case such writing is not executed, to his heirs. Then, by the supplementary instrument

of October 15th, specific distribution of such residue after the death of the grantor, among various relatives, most of whom are named, was directed. Of course the two instruments of October 10th and 15th are to be considered together, and as one instrument; and, notwithstanding the able argument of the learned counsel for the defendants, I am clearly of the opinion that a valid trust was declared in these instruments under the fifth subdivision of the statute of this state. That subdivision, it will be observed, authorizes the creation of an express trust for the beneficial interests of *any person or persons*. Surely there was here expressly declared an active trust for the beneficial interest of the grantor during his life, and of other persons after his death. Apt and proper terms are used in the conveyance to pass the title. Undoubtedly it was the intention of the grantor to convey the title, for he says that from the infirmities of advanced age he deems it best to make the conveyance, and words ample to convey the fee and to divest the grantor of his title are used in the granting clause.

There was a trust to receive the rents and profits and apply them to the use of the grantor, because from an authority to rent must be implied an authority to receive the rents. There was a power to sell and to apply and distribute the estate. The trusts were active, and for the beneficial interests of designated persons. For certain purposes they survived the death of the grantor, and were, I think, of a nature embraced within the Wisconsin statute, the language of which is so broad as to remove the difficulties arising under the New York statute, and to make such discussion as was involved in the New York cases unnecessary. But it is contended that the trust attempted to be created by this conveyance is not fully expressed and clearly defined upon the face of the instrument. Undoubtedly the trusts are sufficiently expressed and defined as far as they relate to Fellows, the grantor. This

was not questioned on the argument. After the decease of Fellows it was provided that his debts and the expenses of the trust should be paid, and then that the residue should be distributed as directed in a supplementary instrument to be executed. By that instrument the grantor directed—*First*, the payment of certain life annuities to sisters, brothers, nephews, nieces, and other relatives, all of whom are named; *secondly*, that Heermans "convey to the children of my niece Phebe Wynkoop surviving me, with a life estate to the said Phebe Wynkoop, the farm on which she now resides," etc.; *thirdly*, that conveyance be made to Nile F. Wynkoop of a certain other farm, and that his brother Sylvanus Fellows and wife, or their survivor, shall have the use of certain property described; *fourthly*, that the residue of the avails of his estate shall be divided equally among his nephews and nieces, all of whom are named; and as part of this residuary clause it is provided that "the shares of such of the aforesaid residuary shareholders as shall have died prior to my death shall be distributed to their children, respectively, according to law; or in case they, or any of them, have no child or children surviving me, then such share or shares shall be extinguished and ignored in the distribution."

As before stated, the two instruments of October 10th and 15th must be treated as one instrument, in arriving at the entire trust which they create. As to all the beneficiaries named in the supplementary instrument, there can be no doubt that the trust is sufficiently expressed and defined. But it is claimed that the persons who are to take under the second clause of the instrument, and those who are to receive property under the residuary clause in case any of the persons named therein die before the decease of the grantor, should have been designated by name, and that this omission leaves the trust so far unexpressed and undefined as to invalidate

the instrument as a conveyance in trust. I am unable to concur in that view. Most of the ultimate recipients of the property are named, and the proportions they are to receive are stated. The trusts are all clearly defined. In the two instances in which it is provided that distribution shall be made among the children of certain persons, there is designation of a class of beneficiaries. The grantor in such a case could not know when the trust is created, who of the class whom he desired to share in his property might be living at his death, or the names of such persons, or whether there would be children of some other beneficiary named surviving him; and I do not think it is the meaning or intention of the statute that the failure to name in every instance the person whom he might desire in certain contingencies to ultimately share in his estate—the class in which such person would belong being specifically designated—should be held to defeat the conveyance as a valid trust instrument, on the ground that it does not fully express and define the trust; and, on the whole, I am of the opinion that by the instruments in question an active trust, valid under the statute, was created, and that the plaintiff was made the trustee of an express trust, clothed with the legal title to the premises in controversy.

The remaining question is, have the defendants established a paramount title? The proofs show that Levi J. Merrick never acquired a title by conveyance from Fellows. He held a bond for a deed, and entered into possession thereunder. It is also proven that he cut timber on the premises, and, by personal acts of occupancy and use, and by various lettings of portions of the land to other persons, he maintained the possession of an ostensible owner for a long series of years. In May, 1857, he received from Worthington a deed of the entire tract, but the evidence does not show that Worthington ever had any title. Merrick undertook to sell certain parcels

of the land to third parties, but the contracts were never consummated because he could not convey a clear title. It will be noticed, also, that the deed from Worthington was made long before the installments of purchase money were due under the contract of purchase from Fellows. There is no proof that Merrick ever paid any portion of that purchase money. On the contrary, the testimony tends to affirmatively show that he paid nothing, and that efforts made in 1864 to obtain payment were unavailing. For many years, with two or three exceptions, the lands were sold for unpaid taxes, and Fellows, by his agent, redeemed them from the tax sales. It is nevertheless true, and this was hardly disputed on the trial, that Merrick steadily exercised acts of possession, and dealt with the land as the claimant of the title. One of the plaintiff 's witnesses—McConnell—testifies, however, that in 1865 Merrick told him he went into possession by virtue of the contract with Fellows made in 1857, and that he had cut timber, cleared a part of the land, and rented a part. He testifies, also, that Merrick admitted to him that he had paid nothing on the contract, and had not kept the taxes paid; that Merrick offered to relinquish all claim for $500, and thought himself entitled to that sum for clearing a part of the land. The proof also shows that at the same time McConnell, as the agent of Fellows, redeemed the lands from various tax sales.

The testimony was objected to on the ground that Merrick is dead, and that evidence of conversations between him and Fellows' agent is inadmissible under the Wisconsin statute.[1] But it is clear, I think, that the objection is not sustained by the language or the meaning of the statute.

The statute of this state, in relation to adverse possession, provides that "where the occupant, or those under whom he claims, entered into the possession of any premises under

[1]Sections 4069, 4070, Revised Statutes of Wisconsin.

claim of title, *exclusive of any other right*, founding such claim upon some written instrument as being a conveyance of the premises in question, * * * and there has been a continual occupation and possession of the premises included in such instrument * * * under such claim for ten years, the premises so included shall be deemed to have been held adversely, * * *"[1] and such adverse possession is declared a bar to an action for the recovery of such real estate or the possession thereof. Further, the statute provides that "when there has been an actual, continued occupation of any premises under a claim of title, *exclusive of any other right*, but not founded upon any written instrument, * * * the premises so actually occupied, and no other, shall be deemed to be held adversely,"[2] and such an adverse possession, continuing for twenty years, shall bar an action for the recovery of the estate.

Under these statutes it is clear that the possession claimed to be adverse must be under a claim of title which is antagonistic to the former owner's title. It must be such as involves the absolute repudiation of the original title, and it must be a claim of title, whether founded upon a written instrument or not, *exclusive of any other right*. There are a few leading principles of law applicable to the present case which must not be overlooked. Evidence of adverse possession is always to be construed strictly, and every presumption is to be made in favor of the true owner. Such possession is not to be made out by inference, but by clear and positive proof.[3]

"To constitute a valid and effectual adverse possession, the possession must be hostile in its inception. * * * No possession can be adverse, except the person in possession holds for himself, to the exclusion of all others, and under a claim of title which is entirely antagonistic to that of the true owner. The claim of title must be *adverse* to that of the claimant, *and not in any manner* subservient to the title of the latter."

[1]Section 4211, Revised Statutes of Wisconsin.

[2]Section 4213, Revised Statutes of Wisconsin.

[3]*Sydnor vs. Palmer*, 29 Wisconsin, 251-2, and cases cited

Tyler on ejectment, 874.

"Where it commences under acknowledgment of the right owner's estate, the possession will retain its original quality through any succession of occupants of the land, and will be presumed to be in subservience to the rightful interest."

Id. 860.

The character of one's possession of land is determined by that of his entry, unless he has given the party holding the title under which he entered, notice of his intention not to hold under that title, or unless there has been a legal eviction, and possession taken or continued under a paramount title.[1] One who enters under a contract of purchase is estopped from denying the title of his vendor so long as he retains possession under the contract.[2] A party in possession of lands, recognizing the title of a claimant, and agreeing to purchase, may subsequently deny such title, set up title in himself, and show that his acknowledgment was produced by imposition or made under a misapprehension of his rights; but a party *entering into* possession under an agreement to purchase, cannot dispute the title of him under whom he enters until after a surrender of the possession.[3]

Now, it cannot be claimed that Merrick's possession was hostile in its inception. It began in subservience to the interest and title of Fellows. Such having been its character at the time of his entry, Merrick's possession thereafter retained its original quality, because there never was a legal eviction of Fellows under a paramount title, nor was notice given to him of Merrick's intention to hold under such a title, nor was there ever a surrender of the possession which flowed from the original entry. There was not an entry into possession by Merrick under the present claim of title, *exclusive of any*

[1] *Quinn vs. Quinn*, 27 Wisconsin, 168.

[2] *Miller vs. Larson*, 17 Wisconsin, 624; *Quinn vs. Quinn, supra*; *Jackson ex dem. vs. Walker*, 7 Cowen, 637.

[3] *Jackson, ex dem. vs. Spear*, 7 Wendell, 401.

other right, which the statute makes essential whether the possession be of 20 years under a claim not founded upon a written instrument, or of 10 years under a claim founded upon such an instrument. And, under the authorities, the case seems clearly one, especially in the light of all the testimony, in which the defendants are estopped to deny the title of Fellows and to assert paramount title by adverse possession. The alleged possession under the Worthington deed began after the contract with Fellows was made, and after the entry under that contract, and, as has been shown, the testimony discloses acts and admissions by Merrick which point to the conclusion that he held under his contract. Further, it is shown that in 1875 Merrick took proceedings under the statute of this state to acquire a tax deed of the premises, and in the affidavit which the statute required him to make, and which is part of the proceedings, he swore that the owner of the land was a non-resident of the county of Milwaukee. It was argued by defendant's counsel that by this allusion to the owner he meant himself; but that is quite inconsistent with the nature and reason of the transaction. The witness McGregor testifies that when, as the attorney of Fellows, he called on Merrick in 1864 to effect a settlement, Merrick excused himself from payment on the ground that he had not received a deed of the land as promised, and had in consequence sustained injury. Indeed, the circumstances tend strongly to show an estoppel resulting from express admissions and positive acts made and done in recognition of Fellows' title. It is true that a long time has elasped since Merrick's possession began, but that cannot help the defendant's case unless it was a possession upon which a valid claim of title could be founded within the principles of law already adverted to. Particular attention was called to the release of this land from the lien of a judgment against Worthington, executed by the bank of Milwaukee, and in

evidence. This, it may be admitted, is a circumstance tending to show that it was at least supposed at the time that Worthington held the title. But there is no proof that he did in fact have the title, and it is a noticeable feature of the proceeding that the bank judgment was recovered within six months after Merrick took a bond for a deed from Fellows, and before even the first installment of the purchase money was due, and after Worthington had undertaken to convey to Merrick.

A pencil memorandum, made, I think, by Fellows, is in evidence, and is to the effect that Worthington sold the land to Merrick, but under objection, on the part of Fellows, to giving title until $1,000 was paid; that Worthington gave a writing of some sort, and then, to make it safe, he was to take the title, and himself give personal security, and Merrick's note in addition; that, because Merrick would not give real estate security, he (Fellows) thought it best to take Worthington's mortgage and Merrick's note; and then, he says, the papers were nearly a year at Milwaukee for that purpose. The memorandum is not sufficiently full to quite explain itself, but to the extent that it is self-explanatory it indicates that the arrangement it speaks of was never carried out, and at all events it is insufficient to satisfy the mind that the title to the land was conveyed by Fellows to Worthington.

I have examined the cases cited by defendants' counsel, and do not find that they are in conflict with the principles before stated and that seem to be controlling here. One of them (*Griswold vs. Butler*, 3 Connecticut, 227) holds, what would hardly be disputed, that where a person takes possession under a parol agreement for a purchase, and *pays for the land*, or purchases it and takes a deed which is defective, the possession of the purchaser which ensues is *prima facie* under a claim of title in himself, and is therefore adverse.

That is not this case; because Merrick neither took a deed from the true owner nor paid for the land.

Without further discussion of the questions involved, I am of the opinion that the title to the lands in suit should be adjudged to be in the plaintiff, and that he is entitled to recover possession.

As to title by adverse possession, see also *Cowly* vs. *Monson*, *ante*, p. 182, and Reporter's note thereto.—[REPORTER.

THEODORE BROCKHAUS vs. ALMA KEMNA *et al.*

CIRCUIT COURT—EASTERN DISTRICT OF WISCONSIN—MAY, 1881.

IN EQUITY.

1. LIFE INSURANCE—PAID-UP POLICY—BENEFICIARY—VESTED INTEREST.—Where a father took out a policy of insurance upon his life, issued upon the endowment plan, and payable to his daughter, and subsequently on account of failing circumstances, exchanged such policy for a paid-up policy, also payable to his daughter, it was *held*, that the daughter had a vested interest in the paid-up policy and the proceeds thereof.

2. SAME—INFANT BENEFICIARY—WAIVER OF RIGHTS—VOIDABLE CONTRACT.—The fact that the daughter, being a minor at the time, agreed, prior to the exchange of policies, that the proceeds of the paid-up policy should be placed in the hands of a trustee, and used for her benefit jointly with her sisters, would not affect the vested interest of such daughter in the proceeds and her sole right thereto, where such agreement did not constitute the substantial consideration for the exchange of the policies.

3. DISAFFIRMANCE OF CONTRACT BY INFANT—BRINGING SUIT.—The bringing suit by the daughter to recover the amount of the paid-up

policy which had been paid to her father as guardian, would be a disaffirmance of all agreements waiving her rights to the policy, entered into while a minor.

Bill in equity to restrain the further prosecution of a suit at law, and to settle the disposition of certain money received on an insurance policy.

Cotzhausen, Sylvester & Scheiber, for complainant.

Jenkins, Elliott & Winkler, for defendant Alma Kemna.

DYER, J.—This is a bill in equity, to which the defendant Alma Kemna has interposed a demurrer. The bill alleges that on the seventeenth day of September, 1880, the defendant Alma Kemna commenced a suit in this court against the complainant and one Gustav Haug and one August Frank, in which she alleged

"That on the fifteenth day of October, 1878, the complainant, upon application made to the County Court of Milwaukee county, was appointed her guardian during her minority; that as such guardian he, as principal, and said Haug and Frank, as sureties, executed a bond in the sum of $4,000 for the faithful discharge of his duties as such guardian; that default was made in the performance of the conditions of the bond; that no inventory of his ward's estate was ever filed by complainant; that about the twenty-fifth day of October, 1878, the sum of $1,755.12, which was the property of said Alma Kemna, came to the possession of complainant as her guardian; that on the tenth day of August, 1880, she became of age, that her guardian, the complainant, had never accounted for the moneys aforesaid; and judgment with execution for the sum before mentioned, and interest was demanded."

It is further alleged in the bill that the defendants in the action so commenced by Mrs. Kemna appeared therein and filed their answer to her complaint. The bill then proceeds to set out the following state of facts:

The complainant has three children, namely, Alma Kemna, now married to one Edward Kemna, Laura Brockhaus, and Clara Brockhaus,—the two last named being minors and

unmarried, and living with complainant and his wife, the defendant Franziska Brockhaus. About fifteen years since the complainant was engaged in mercantile business, and was in comfortable circumstances. In order to guard against possible future adversities, and for the purpose of providing a cash fund for the benefit of his daughters when they should become of age or should become engaged in marriage, he at various times between 1864 and 1867 caused his life to be insured by three several policies of insurance issued by the Mutual Life Insurance Company of New York, upon the endowment plan, payable respectively when he should arrive at 50, 55, and 60 years of age. These policies were made payable to the complainant's children, respectively; but it was alleged that they were never delivered to them, nor to any one for their use, but were continuously held and controlled by the complainant, who paid all the premiums thereon. The first of these policies was for $2,000, dated March 17, 1864, and payable to Clara Brockhaus when the insured should become 60 years of age. The second policy was for $2,000, dated October 12. 1867, and was payable to Alma Brockhaus (now Alma Kemna) when the insured should become 50 years of age; and the third of said policies was also for $2,000, dated October 12, 1867, and was payable to Laura Brockhaus when the insured should arrive at the age of 55 years.

In 1874 the complainant became embarrassed in his business, and lost all of his property. Because of pecuniary troubles he became unable in the years 1874, 1875, 1876, and 1877 further to pay the premiums which, from time to time, matured upon the policies, although, by the assistance of others, he succeeded for a time in keeping the policies in force. Subsequently, failing in this, after consultation with his wife and children—the latter being then minors, but of quite advanced age and discretion—it was concluded that the

policies should be surrendered, and exchanged for fully paid-up policies. When about to perfect such surrender, it was found that the amounts eventually maturing, by virtue of the proposed new policies, would vary, and thereby cause inequality among the children, owing to the fact that the largest amount of premiums had been paid on account of the policies earliest maturing; the surrender value on each policy being as follows: On the policy to Alma, $1,690; on that to Laura, $1,170; on that to Clara, $990. In view of these circumstances, and for the further reason that all of the children were entitled to equal consideration and regard, it was agreed in family council that the insurance moneys, as they should eventually mature, should be paid over, when received, to the defendant Franziska Brockhaus, who should invest the same for the benefit of the children, and divide the proceeds in their support, maintenance, and education, as the necessities of their condition might require. The complainant then delivered up to the insurance company the policies by him originally taken out, and received in return therefor three other paid-up policies,—one for $1,690, dated October 21, 1876, and payable in 1878 to Alma Brockhaus; one for $1,170, dated October 25, 1876, and payable in 1883 to Laura Brockhaus; and one for $990, dated April 3, 1877, and payable in 1888 to Clara Brockhaus. It was alleged that all of these policies, when issued, were held by the complainant, and were still in his possession, with the exception of the policy in favor of Alma, which matured in 1878.

It appears further that on the thirty-first day of May, 1878, and before any of the new policies matured, for the purpose of avoiding, as it was alleged, any possible misunderstanding as to the eventual disposition of the proceeds of the policies, the agreement between the complainant and his family heretofore spoken of was reduced to writing, and was executed by the complainant and his said three children, and

was then delivered to the defendant Franziska Brockhaus, and has since been held by her. The material recitals of that agreement are as follows:

The said party of the first part (Theodore W. Brockhaus) having at different times had his life insured for the benefit of the parties of the second part, (Alma, Clara, and Laura Brockhaus;) and, whereas, some of the parties of the second part would, in case of the death of the party of the first part, be entitled to receive on account of such insurance more than others; and, whereas, the party of the first part is desirous of equalizing the several amounts coming to the parties of the second part by having the same divided equally among them, so that one should not have preference over the other; and, whereas, the said party of the first part is desirous, and so declares it to be his intention by the terms of this agreement, that his beloved wife, Franziska Brockhaus, shall take and receive the several sums of money as the same shall become due and payable to the said parties of the second part, and hold the same, and pay it over to the several parties of the second part as she, in her best judgment, shall deem it advisable to do: Therefore, it is mutually understood and agreed, by and between the parties hereto, that the wife of the said party of the first part, and the mother of the parties of the second part, Franziska Brockhaus, shall take the several sums of money that the said parties of the second part may be entitled to receive from the several insurance companies hereinafter mentioned, and invest the same or divide it between the parties of the second part as she, in her best judgment, shall deem it advisable to do; and to that end, and for that purpose, the said parties of the second part hereby release all claims upon said several sums of money, and authorize the said Franziska Brockhaus, in their names or otherwise, to receipt for, pay over, and invest all said several sums of money as hereinbefore mentioned.

The amounts to thereafter become due upon the several policies, and the persons to whom the same would become payable, were recited in the agreement, which bore the signatures and seals of the respective parties thereto.

It is further alleged in the bill that this agreement has, since its execution, remained in full force and effect, and been continuously acted upon in the control and disposition of the trust fund thereby created, and that the same has not been repudiated by either of the parties thereto except by Alma Kemna, who married on the seventh day of January, 1879.

The further facts disclosed in the bill are that when the paid-up policy for $1,690, to Alma, matured, the insurance company insisted that as she was a minor a guardian should be appointed for her, and thereupon complainant, relying as he alleged upon the agreement before recited, procured an appointment as the guardian of Alma, and executed the bond before mentioned; and, having qualified as such guardian, he collected from the insurance company, on or about October 25, 1878, the sum of $1,755.12, and deposited the money in the bank, at four per cent. interest; and about the thirteenth day of May, 1880, the sum of $1,650, part of the proceeds of said policy, was used in the purchase of certain real estate situate in Milwaukee, the title thereof being taken in the name of Franziska Brockhaus. And it was alleged that this property is yielding some income, which inures to the benefit of the trust fund created by the before-recited agreement.

It is also stated in the bill that complainant, in the matters aforesaid, has acted in good faith, prompted by no other consideration than the welfare of his family, and a desire, in case of his death, to equally distribute among his children whatever might be thus saved for them; but that the defendant Alma Kemna, acting under the influence of her husband, has commenced the suit before referred to against him and his sureties on the guardian's bond, and is therein demanding a judgment on the ground that complainant has converted to his own use the moneys received upon the policy of insurance in which she was named as beneficiary.

These are the material allegations of the bill, the prayer of which is that the control and disposition of the insurance money, alleged to have been exercised and made, be quieted and affirmed by decree of this court; that the defendant Alma Kemna be restrained from in any manner claiming that a breach of the conditions of the guardian's bond has occurred, and from further prosecuting her action at law against the

complainant and his sureties upon the bond; and also that, if the agreement before recited should be found not to sufficiently express the intent of the complainant in providing a trust fund, and for the eventual disposition thereof, or that upon its face it is ambiguous, or likely to cause misunderstanding between the parties thereto, it may be reformed, so that it shall conform to the original intention of the parties, and be effectual for the future discharge of the trust alleged to have been thereby created; and that all the rights and obligations of the parties growing out of the insurance policies may be defined, settled, and adjudged.

The bill is demurred to on the general ground of want of equity, and for multifariousness.

The determination of the first ground of demurrer involves the consideration of the rights and equities of the parties springing from the procurement of the policies of insurance upon the life of the complainant, and from the transactions recited in the bill. And first, I do not see how even a court of equity can enforce against Mrs. Kemna, as a bar to any legal right she otherwise had, the arrangement first made in family council and subsequently reduced to writing, and executed as a written agreement, by which the proceeds of the insurance policies should be put into the hands of Franziska Brockhaus and distributed and used by her for the equal benefit of the three children. It may be that this arrangement was, in a measure, the inducement to the exchange of the original policies for new and paid-up policies, though it would seem from the averments of the bill that the surrender of the first policies had been determined upon before the family arrangement was made, and that the real and original occasion of it was the inability of the insured to pay the premiums and keep those policies in force. When the arrangement was made, and when it was subsequently put in the form of a written agreement and formally executed,

Mrs. Kemna was under the disability of infancy. As to her the agreement was voidable, and if she had any rights in the insurance on her father's life, that agreement was liable to be disaffirmed and repudiated on the attainment of her majority. And, if she has now chosen to repudiate it, the court does not perceive how, even in equity, it can be interposed against legal rights, which, without such agreement, would exist in her favor. I am of opinion, therefore, that in considering the case we are remitted to the question whether Mrs. Kemna had any vested right or interest in the paid-up policy of insurance in which she was named as beneficiary, or in the proceeds of that insurance, though in passing upon that question it may be necessary to further consider the effect of the alleged family understanding or agreement.

In support of the demurrer it is contended that Mrs. Kemna had such vested interest; that the complainant, whose life was insured for her benefit, could not revoke the policy or change its destination by his own act; that the transaction was in its legal effect an executed gift; and that there was nothing in the family arrangement or agreement that can be construed as an assignment of the policy from the complainant to his wife, or as a valid appointment of her as a new beneficiary.

In support of the bill it is claimed that a change of beneficiary was made before the original policy was exchanged for a paid-up policy; that the law of gifts must be applied to the case; that there was no such delivery of either of the policies to Mrs. Kemna, or to any one in trust for her, as to make a valid, executed gift; that Mrs. Kemna had no vested interest in the policies; and that the transaction was nothing more than a voluntary executory settlement, which was subject to revocation at any time before it was fully executed, and which was not susceptible of gift as a chose in action. Furthermore, it is insisted that by bringing suit on the

guardian's bond Mrs. Kemna has ratified the contract which she made with her father, before recited, because, as it is claimed, she had no absolute vested interest in the first policy, and the paid-up policy in which she is claiming a vested interest was procured after the contract was originally made, and in pursuance of it. Precisely what are the rights, and what is the interest, of a designated beneficiary in an ordinary policy of life insurance, and to what extent the insured may control or change the ultimate destination of the insurance proceeds, is a vexed question, and some of the cases in which the question has been determined, cannot be reconciled.

In *Clark vs. Durand*, 12 Wisconsin, 248, the facts were peculiar. The insured procured insurance on her life, payable to Henry S. Durand as guardian of her son. Durand was not in fact such guardian, but advanced the money to pay the premiums. Subsequently, the assured, in consideration that Durand would thereafter continue to pay the premiums, transferred the policy to him, and he kept the policy in force until her death. He then collected the insurance and appropriated the money to his own use. Thereupon Henry W. Clark brought suit against Durand for the proceeds of the insurance, claiming that he was the beneficiary in the policy, and that his mother could make no assignment of the policy which would defeat his vested interest therein. The action was held not maintainable, the theory of the decision being, that the insured could not be compelled to keep the policy in force; that the insurance, so far as Clark was concerned, was merely a proposed gratuity, and that he was a mere volunteer, having no present beneficial interest or vested right in the policy, or the moneys secured by it, prior to the transfer of the policy to Durand. The policy is characterized in the opinion as an executory contract, which it was held the insured could transfer to Durand with the assent

of the company, he agreeing to pay the premiums. Although the court in this case do in effect lay down the rule contended for by counsel in the case at bar, it is not to be overlooked that the peculiar state of facts in *Clark vs. Durand* might well support the judgment, because, as is pertinently said by Mr. Justice Cassoday, in commenting upon that case in *Foster vs. Gile*, decided by the same court, and hereafter referred to, "it would seem that the equitable interests of the mother, and her assignment to Durand, who paid all the premiums, were sufficient to vest the absolute title in Durand, to whom the insurance was in fact made payable. * * * Thus the legal and equitable estate became united in Durand, and the only question was whether the infant was entitled as *cestui que trust*."

In *Kerman vs. Howard*, 23 Wisconsin, 108, it was held that where a husband survives his wife, having previously procured a policy of insurance on his own life for her benefit and himself paid the premiums thereon, he may dispose of it by will or otherwise. The construction of a statute of the state was involved in the case; but, independently of the statute, the court in effect held that the insured might change the policy in favor of some other person, or use or assign it as a means of credit or security, or discontinue payment of the premiums and let the policy lapse, or that he might bequeath or assign the beneficial interest in the policy as he should think proper. It must, therefore, be said of this case that it follows in the track of *Clark vs. Durand*.

The latest enunciation of the Supreme Court of this State on the subject is found in *Foster vs. Gile*, 50 Wisconsin, 603 In this case the person insured had procured a policy insuring his life for the benefit of two children. The father survived the children and died intestate, leaving a widow surviving him, and the question was whether the proceeds of the insurance belonged to the estate of the children

or to the estate of the father. It was held that the beneficial interest of the children did not lapse by their death, but passed to their administrator to be distributed as estate of such children. From the opinion of Mr. Justice Lyon it is evident that the court were not satisfied with the rule laid down in *Clark vs. Durand;* and, though it is said that the rule must be adhered to, the learned justice, speaking for the majority of the court, expresses the opinion that there is a middle ground upon which the judgments in *Clark vs. Durand* and *Kerman vs. Howard* may rest, which is, that the taking of a policy by the insured, payable to another, is so far in the nature of an executed voluntary settlement that it vests in the person to whom the insurance money is made payable an actual subsisting interest in the policy, but that this interest is subject to the right of the insured to revoke the same, and retain it himself or vest it elsewhere. With great respect for the view thus taken, which really leads to the same result as that reached in *Clark vs. Durand*, I am constrained to think that in such a case there must either be an actual vested interest in the beneficiary named in the policy, which the insured cannot of his independent volition take away, or no vested interest whatever; for the existence of a subsisting vested interest in the beneficiary seems inconsistent with a reserved right of revocation in the insured. And this evidently is the view of Mr. Justice Cassoday, who files a separate opinion in the case, marked by his usual research, and in which the authorities are industriously collected; for, while he concurs in the conclusion of the majority of the court, as I understand him, he plants his opinion on the ground that the children of the insured acquired an absolute vested interest in the policy as between them and their father.

These are the decisions upon the question in this state, and they are substantially followed by *Charter Oak Life Ins. Co.*

vs. Brant, 47 Missouri, 419, and *Gambs vs. Covenant Mutual Life Ins. Co.* 50 Missouri, 44.

In *Ricker vs. The Charter Oak Life Ins. Co.* 27 Minnesota, 193, decided by the Supreme Court of Minnesota, precisely the opposite view was taken from that held in *Clark vs. Durand.* The facts were that a person procured insurance on his own life, payable on his death to his then wife, if then living; otherwise, to his children. His wife died, leaving her husband and their children surviving her. At her death all premiums had been paid. Afterwards the insured again married, and then, without the consent of his children, surrendered his policy to the company, and took a paid-up policy, payable to his second wife. It was held that the transaction, on his part, was in the nature of an irrevocable and executed voluntary settlement upon his first wife and the children, and that the surrender of the first policy was invalid, as against the children.

In *Landrum vs. Knowles*, 22 New Jersey Equity Reports, 594, a policy of insurance was taken by a wife on the life of her husband in favor of her children. After the payment of a succession of premiums she assigned the policy in payment of a debt of her husband, and the assignee paid the premiums thereafter accruing. After the death of the husband, the children claimed the whole sum due on the policy, and it was held that up to the time the mother ceased to pay the premiums, the transaction was an executed gift by the mother, enforceable in equity by the children, but that the acquisition of a further interest, by the payment of subsequent premiums, was executory, and was not acquired by her, and could not, therefore, be claimed by her beneficiaries. This ruling goes clearly on the ground that, up to the time of the assignment of the policy, and for all which the policy then represented, the children had a vested interest acquired by executed gift.

Mr. Bliss, in his work on Life Insurance, § 318, states it as the general rule "that a policy, and the money to become due under it, belong, the moment it is issued, to the person or persons named in it as the beneficiary or beneficiaries, and that there is no power in the person procuring the insurance, by any act of his, by deed or by will, to transfer to any other person the interest of the person named." These, including the Wisconsin cases, are some of the leading authorities on this question. Others are cited in the opinion of Cassoday, J., in *Foster vs. Gile, supra.* They are referred to rather for the purpose of showing the state of the decisions on the subject, than otherwise, for the facts set out in the present bill are somewhat peculiar, and seem to make this case distinguishable, except as some general principles are involved, from any of the decided cases to which I am referred.

Whatever principle of law might be regarded as applicable and controlling if the right of Mrs. Kemna to the first policy in which she was named as beneficiary, or its proceeds, was involved, an important fact in the case is that the complainant surrendered that policy and received from the company a paid-up policy, payable to Mrs. Kemna in 1878. The same was done with reference to the other policies in which his other daughters are named as beneficiaries. This new policy, payable to Mrs. Kemna, was an absolute promise on the part of the company, in consideration of the past payments of premiums, to pay her $1,690. It was not a policy liable to lapse, but it constituted an absolute, fixed liability, and the question is whether, as between the father and daughter, it was not an executed gift from him which he could not revoke. I can have no doubt that it was, unless the circumstances under which the act was done can have the effect to create other rights between the parties.

The complainant did all that he could do to make the gift

of the policy to his daughter complete and effectual. He paid the premiums while the original policy was running, and procured the paid-up policy to be issued, payable in express terms to his daughter Alma at a specified time, and without any condition or stipulation in the policy reserving a right to change or alter it, so far as the bill shows; and, in the language of some of the cases cited, this was all that could well be done, under the circumstances, so far as the father and child were concerned, to vest in his appointee the entire interest in the policy and all rights thereunder. As between those parties no further ceremony or fact was needed to the perfection of the gift. *Landrum vs. Knowles, supra.* The gift was voluntary, but it was completely executed, and nothing further remained to be done but to await the period when the insurance company could be called on to make payment. That period was reached, and the complainant then received the proceeds of the insurance, not for himself or in his individual name or right, but as the guardian and representative of his daughter; so that in legal effect the payment was made to her as the beneficiary. This, if it were essential, was the consummative act, completing the gift beyond recall, unless, as before stated, the circumstances of the whole transaction so affected the relations of the parties as to qualify or change what would otherwise be strictly legal rights. Did the circumstances have that effect? I cannot think they did. Mrs. Kemna was not bound by the arrangement made in the alleged "family council," nor by the subsequent agreement which she signed. She was under the disability of infancy, and she could, if she wished, on attaining her majority, disaffirm and repudiate the agreement. The bill shows that the complainant was unable to continue the payment of premiums on the original policies, and that it was therefore determined that those policies should be surrendered and exchanged for policies fully paid up; and it may be fairly inferred, from the

allegations of the bill, that this was determined upon before any understanding was had that the proceeds of the paid-up policies should ultimately go to Mrs. Franziska Brockhaus. It was then arranged, for reasons stated in the bill, that such proceeds when realized should be received by Mrs. Brockhaus, but for the benefit of all the children. It is true that this transpired before the actual surrender of the original policies, and consequently there was a change of beneficiary, if any change was in legal contemplation made, before the paid-up policies were taken. But I can hardly think that the arrangement made in family council should be held to have operated as an assignment of the original policy running to Alma, least of all of the new paid-up policy which was subsequently made to her; and in this connection it is not to be overlooked that, notwithstanding what had previously transpired between the parties, the new policy was in terms made payable to Alma. The alleged change of beneficiary was not, in name at least, carried into that policy. It may, perhaps, be fairly presumed that the complainant, in taking a paid-up policy, relied on Mrs. Kemna's adherence to the understanding with reference to the ultimate appropriation of the proceeds; but I do not think it can be said, upon the present allegations of the bill, that the family arrangement was the substantial consideration which prompted the exchange of the old policies for new paid-up policies. And on the whole, with reference to the circumstances which preceded and accompanied the surrender of the first policy running to Alma, for the paid-up policy, as also with reference to the subsequent written agreement, it must, I think, be said that a change of beneficiary could not be made without the legal consent of Mrs. Kemna, and such consent was not given beyond her power of disaffirmance.

It is alleged that the complainant caused himself to be appointed guardian of Mrs. Kemna for the receipt of the

insurance moneys, at the instance of the insurance company, and because it required him so to act. But I do not think this can avail him against the legal consequences of the act, when taken in connection with the legal import and effect of the contracts by which the insurance company obligated itself to make payment.

It is claimed also, that by bringing suit on complainant's bond as guardian, Mrs. Kemna has ratified the action taken at the time of the surrender of the old policy for the paid-up policy, and therefore should not be permitted to make her present assertion of right to the proceeds of the latter policy. But it seems to me that such is not the effect of her proceeding, and that it is rather a disaffirmance of the agreement entered into by her during her minority by which Mrs. Brockhaus was to take the proceeds of the insurance. The assertion of her supposed right to those proceeds could only be made by demand of payment or suit for their recovery, or on the guardian's bond. And, in such case, to say that a resort to the only course open to her for such assertion of her alleged right operates as a ratification of that which she now disavows, seems to me equivalent to a denial of all power to disaffirm. Of course, if it were a directly alleged fact that the whole inducement for taking the paid-up policy was an actual change of beneficiary, and a transfer of interest to Franziska Brockhaus as such beneficiary, a different phase of the question might be presented; but I do not understand such to be the meaning of the bill.

The court is not oblivious of the objects evidently in view when the family understanding was had in 1876. But I see no escape from the conclusions indicated, when the case is considered, as it must be, with reference to the absolute legal rights of the beneficiary named in the paid-up policy.

The demurrer to the bill will therefore be sustained.

Note.—If a life insurance policy designates a person to whom the

insurance money is to be paid, the person who procures the insurance and who continues to pay the premiums, has no authority by deed or will, to change the designation of or title to the money. He is under no obligation, in the absence of agreement, to continue to pay the premiums, but if he does so, the person originally designated in the policy will derive the benefit. *Succession of Kugler*, 23 Louisiana Annual, 455; *Pence vs. Makepeace*, 65 Indiana, 345; *Gould vs. Emerson*, 99 Massachusetts, 154; *Ruppert vs. Union Mutual Ins. Co.*, 7 Robertson, 155; *Chapin vs. Fellowes*, 36 Connecticut, 132; *Lemon vs. Phœnix Mut. L. Ins. Co.*, 38 Connecticut, 274. And an action may be brought by the beneficiary to quiet her title therein and to bar the claims of others. *Godfrey vs. Wilson*, 70 Indiana, 50.—[REPORTER.

DANIEL J. COFFEY vs. UNIVERSAL LIFE INSURANCE COMPANY.

CIRCUIT COURT—EASTERN DISTRICT OF WISCONSIN—MAY, 1881.

IN EQUITY.

1. LIFE INSURANCE—RIGHT TO PAID-UP POLICY—FORFEITURE SIXTY DAYS' DEFAULT.—The plaintiff was the holder of an endowment life insurance policy, issued by the defendant company, which provided that in case of default in payment of any premium, after two full years' payments had been made, the policy might be exchanged for a paid-up policy for a certain amount, subject to the condition that the policy duly receipted "shall have been transmitted to and received by the company within 60 days after such default." *Held*, that in case of default in payment of premium and no offer to surrender the original policy for a paid-up policy until a year and a half afterwards, the failure to transmit the policy within 60 days after default, would in the absence of excusing circumstances involve the loss of the right to a paid-up policy.

2. ESTOPPEL OF COMPANY TO SET UP FORFEITURE. — But where the company had refused by its agent to accept the premium on the day it was due, on account of proceedings against it for dissolution and appointment of a receiver, and had not notified the plaintiff to pay the premium elsewhere, and had refused to give him information and had informed him that his policy had wholly lapsed, and could not be revived until after the end of the court proceedings, if at all, the company are estopped from setting up the failure to transmit the policy within 60 days after default in payment of premium, as a forfeiture of the right to a paid-up policy.

George H. Noyes, for complainant.

Sleeper & Whiton, for defendant.

DYER, J.—This is a bill to compel the defendant company, which is a corporation of the state of New York, to issue to the complainant a paid-up policy of life insurance of the amount of $600; and the controversy between the parties arises upon the following state of facts:

On the twenty-third day of May, 1868, the complainant procured from the defendant company a policy of insurance on his own life, for the sum of $1,000, payable to Honora Coffey on the twenty-third day of May, 1883, or in case of complainant's death before that day, then within 30 days after notice and proof of death. The policy required the premiums to be paid in four installments, of $14.26 each, on the twenty-third day of May, August, November, and February, in each year, and contained a condition that in case of default in the payment of either of the premiums the policy should become void, and all payments thereon should be forfeited, except as further provided. By the terms of the policy it was further stipulated, that, in case of default in any payment after two full years' payment had been made thereon, the policy might be exchanged for a paid-up endowment policy for an amount stated in a table given in the original policy, subject to the condition that the policy, duly receipted,

"shall have been transmitted to and received by the company within 60 days after such default, and that no condition of the policy shall have been violated." By the table annexed it was made to appear that the complainant, after nine years' payment of premiums, would be entitled, under the conditions before stated, to a paid-up term policy for $600.

All premiums were paid to the twenty-third day of May, 1877, inclusive, covering a period of nine years from the date of the policy. Payments were made to local agents of the company in Wisconsin. On the twenty-third day of August, 1877, the complainant went to the company's agent in Milwaukee, as usual, and desired to pay the premium due on that day, but was told by the agent that the business of the company was in the hands of a receiver, or would be, and that he had no authority to receive the money. The complainant testifies that he offered to pay the premium due on that day, but was advised by the agent not to make any more payments until the business of the company was settled.

It appears that on the twelfth day of July, 1877, the attorney general of the state of New York filed an information against the company, in the Supreme Court of that state, alleging its insolvency, and praying for an order to show cause why its business should not be closed, and for a decree dissolving the company and appointing a receiver. On the eighteenth day of July, 1877, an order was entered by the court in those proceedings permitting any policy-holder, until further order, to pay the United States Trust Company any premiums thereafter becoming due on policies issued by the insurance company, with the same effect as if paid to said company. Afterward, and on the twenty-third day of August, 1877, which was the day when the premium on complainant's policy was due, the court made an order restraining the company from exercising any of its corporate rights, privileges, and franchises, except receiving and paying moneys as there-

after allowed, and from paying out, or in any way transferring or delivering, to any person, any of the effects, moneys, or property of the company, except salaries of employees and officers then due, and from collecting or receiving any debts or demands except interest, agents' balances, and premiums, until the court should otherwise order. This order remained in force until October 29, 1878, with certain modifications,—such of which as are material here will be presently referred to. On the 1st day of September a further motion was made for the appointment of a receiver. Orders were duly entered postponing the hearing of this motion from September 4th to September 8th, and from the latter date to September 14, 1877, on condition that none of the policies of the company should be decreed to have lapsed or become forfeited by reason of the non-payment of premiums due after September 3d and before the decision of the motion for a receiver; to which condition the company consented. Again, on the fourteenth of September, the hearing of all motions in said proceedings was adjourned until November 17, 1877. On the thirteenth day of October of that year an order was entered permitting the company to accept payment of debts due to it, including payments on mortgages, and restraining all persons and corporations from commencing any action or proceedings against it. On the eighth day of December, 1877, an order was made postponing the hearing of the motion for a receiver until such time as it might be brought on by the attorney general, on five days' notice. This order also provided that the time of payment of all premiums due and to become due on outstanding policies be extended 30 days after the entry of the final order on the motion for a receiver; and all injunctions theretofore granted were continued in force until the final order of the court, except in particulars further specified, but not material here. Various proceedings were thereafter had, until, on the twenty-ninth day of

October, 1878, an order was made vacating the order of August 23, 1877, so far as it restrained the company and its officers from exercising any of the corporate rights, privileges, and franchises of the company, and the company, and its trustees and officers, were authorized to resume their powers in the business of the corporation and their control over its assets. This order required that a copy of the same be sent to every policy-holder, with a notice declaring the company solvent, and requiring such policy-holder to pay his premiums, past due and unpaid, within 90 days from the day of mailing a copy of the order and notice, and provided that the company should not forfeit any insurance, by reason of the non-payment of past due premiums, until after the expiration of said 90 days; the court reserving the power to relieve from any forfeiture by reason of the non-receipt of a copy of the order and notice, on good cause shown.

It appears that about the twenty-first day of July, 1877, the company deposited in the mail at New York a postal card, upon which was printed so much of the order of the court in New York, of date July 18, 1877, as permitted policy-holders to pay premiums thereafter becoming due on their policies to the United States Trust Company, which was undoubtedly intended to be sent to the complainant, but was in fact addressed to Honora Coffey, Milwaukee, Wisconsin. Prior to August 23, 1877, a postal card was also mailed, giving notice of the amount of the premium falling due on the complainant's policy on August 23d, and of the time when due, and that it could be paid at the office of the company, or to an agent, when such agent produced a receipt signed by an officer of the company; but this was also addressed to Honora Coffey. Neither of these postal cards was received by the complainant, but he was informed by letter from the secretary of the company, of date March 9, 1878, of the order of July, 18, 1877. Correspondence between the attorneys for com-

plainant and the company, extending from August 8, 1878, to March 29, 1879, shows that about the twenty-fifth of February, 1879, the former were informed of the entry of the order of the court, of date October 29, 1878, and that about the seventeenth day of March, 1879, the complainant formally offered to receipt and transmit his policy to the company, and requested the issuance of a paid-up policy to him, or an opportunity to pay the back premiums then unpaid. The company declined to comply with either of these requests, on the ground that the notices before mentioned were duly sent; that the complainant was advised of the situation of affairs when the proceedings against the company were pending, and failed to seasonably take any steps either to keep his policy in force, or by receipt and transmission of the same to procure a paid-up policy. The complainant, in his testimony, says that he did not receipt and transmit the policy within 60 days after August 23, 1877, because he did not think the company was in existence, and because he had no instructions so to do.

Upon this state of facts it is contended in behalf of the complainant that by the payment of nine years' premiums he purchased paid-up insurance to the amount of $600; that the transmission and receipt of the policy within sixty days after default in any payment of premium was not a condition precedent to the right to have a paid-up policy; that by the proceedings against the company in New York it was then disabled to issue such a policy, even if the original policy had been receipted and transmitted within the sixty days, and therefore strict performance of the condition of the complainant was excused; that, under all the circumstances, the ultimate offer to receipt and return the policy, and the demand of a paid-up policy, were seasonably made; and that the court ought not to make such a decree as would operate to enforce a forfeiture of the complainant's rights under his

policy. The grounds for relief thus urged are all combated by counsel for defendant, who insist that time was of the essence of the condition requiring transmission and the receipt of the policy within sixty days after default in the payment of any premium; that by the failure to make payment, and then the further failure to receipt and transmit the policy within the required time, the policy lapsed, and all right to a paid-up policy was lost; that the temporary disability of the company did not excuse non-compliance with the condition requiring action on the part of the insured within the prescribed time; and that the offer to receipt and return the policy after such disability was removed was not seasonably made.

The case has been argued rather upon propositions of law touching the proper construction of the clauses in the policy, and the strict rights of the parties under the literal letter of the policy, than in the light of the exceptional facts and circumstances of the case. Looking alone at the policy, it may be said of it, in substantially the language of the court in *New York Life Ins. Co. vs. Statham*, 93 United States, 30, that the contract is not an assurance for a single year, with a privilege of renewal from year to year by paying the annual premium, but that it is an entire contract of assurance for 15 years, or for life, if the assured should die before the expiration of that period, subject to discontinuance and forfeiture for non-payment of any of the stipulated premiums, except that in case of default in any payment after two full years' payments had been made, the policy might be exchanged for a paid-up policy for a certain amount, on transmission of the original policy, duly receipted, to the company within sixty days after such default. This was the contract. In the absence of anything to save the case from the operation of the letter of the policy, it was undoubtedly the duty of the assured, if he wished to keep the policy in continuing force,

to pay the premium due August 23, 1877, on that day. If, on the other hand, he wished to secure a paid-up policy, he could make default in the payment of the premium, and then his duty was to transmit the original policy, duly receipted, to the company within sixty days after such default. These were conditions precedent in the one case to the maintenance of his rights under the original policy, and in the other to his right to a paid-up policy. Failure to perform either, if there were no circumstances adequate to excuse non-compliance with these conditions, involved a lapse of the policy and loss of all rights thereunder. This conclusion is sustained by the better authorities on the subject.

But cases of the general character of this, sometimes arise, in which the circumstances are deemed adequate to justify the courts in relieving a party from such consequences, and in which such relief is deemed consonant with proper observance of the rights of parties under their contract. Does this case fall within that category?

On the twenty-third day of August, 1877, the assured applied to the company's agent to pay the premium then due. He had paid the premiums in all previous years to local agents. The company had authorized it, or at least had sanctioned it, by the acceptance of the payment. With reference to the premium due August 23, 1877, he received no notice to do otherwise. A notice that the premium would be due on that day, and that the holder of the policy might pay it at the office of the company in New York, or to an agent who should produce a receipt signed by the officer of the company, was mailed by the company, but it was not addressed to the complainant, and was not received by him. This was no fault of his. The agent to whom he offered to pay the premium refused to accept it. This, under the circumstances, was the refusal of the company. In the beginning, then, we find that the assured was deprived of the opportunity to pay his

premium on the day it was due, and thereby keep his policy in force, by the refusal of the company to accept the premium. Moreover, the agent informed the assured that the business of the company would be or then was in the hands of a receiver, and advised him not to make any more payments until the business of the company should be settled. Perhaps the agent was not authorized thus to speak for the company, but it is still a material fact that this information and advice emanated from one with whom the assured was authorized to deal as the local representative of the company; and the assured, it appears, was led to rely and rest upon this information. Meantime, the fact was that proceedings had been instituted and were then pending in the courts of New York for a dissolution of the corporation; and, on the very day the assured was seeking to pay the premium on his policy in Wisconsin, the company was enjoined in New York from exercising its corporate rights, privileges, and franchises, except in certain very limited particulars. It is true that on July 18, 1877, an order was made permitting policy-holders to pay their premiums to the United States Trust Company; but again, by the fault of the insurance company, notice of this order was mailed under the wrong address, and was never received by the complainant, nor, so far as the proofs show, did he know that such an order had been entered until March, 1878, when mention was made of it in a letter which he received from the secretary of the company. Under the circumstances stated, the complainant rested from August, 1877, until February, 1878, when it appears he wrote a letter, addressed to the receiver of the Universal Life Insurance Company, which the proofs indicate was a letter of inquiry, and which was probably thus addressed because he had been led to suppose, from statements made by the local agent of the company in August previous, that a receiver was in charge of the affairs of the company. To this letter the secretary

of the company made answer by communication of date February, 1878, as follows:

"We beg leave to state to you that no receiver has been appointed for this company, and, further, to state to you that we think it is quite unnecessary to answer the questions you propound to the receiver, for the reason that your policy No. 4472 became absolutely forfeited, according to its terms, for the non-payment of the premium due August, 1877. You have, therefore, no such interest in the company's affairs as would warrant any reply to your questions."

Thus, after the company, by its own agent, had refused to accept the premium offered on the day it was due, and had given the assured no notice of opportunity to pay it elsewhere, and he had been led to rest inactive for months, when first he sought information to which, under the circumstances, he was then clearly entitled, he was curtly told, in substance, by the secretary of the company, that his policy had become absolutely forfeited for non-payment of the August premium, and that therefore he had no such interest in the company's affairs as would warrant a reply to his inquiries. In this manner the assured was dealt with at a time when, upon a showing of the facts then existing, no court deserving the name of a court of equity would have hesitated to compel either the acceptance of the unpaid premiums for the purpose of keeping the policy in force, or the acceptance of a surrender of the policy as the basis of a right to a paid-up policy, as the policy-holder might elect.

But the complainant, still persistent in efforts to obtain information, on the fifth of March, 1878, addressed a letter to the Superintendent of Insurance of the state of New York, which, it seems, was put into the hands of the secretary of this company, and he replied, stating, among other things, that prior to the date when the premium of August, 1877, became due the company had mailed to the complainant a notice that that premium could be paid to the company direct, or to the United States Trust Company; that, if paid to the

trust company, it would be subject to the order of the court in the matter, and that an order to that effect was made by the court on the eighteenth day of July, of which all the policy-holders had due notice. This statement was incorrect in several particulars. No such notice had been sent to the complainant, nor did the notice which the company misdirected, according to its own proof, state that the premium could be paid to the company direct, nor did the order itself so provide. The complainant was then informed that he had chosen to act upon reports and public assertions in reference to the affairs of the company, instead of making inquiry direct at the office. And this was said in the face of the secretary's letter of February 18th, in which the assured was informed that his policy was forfeited, and his requests for information were summarily refused, and treated as the inquiries of an impertinent intruder. In the letter of March 9th the secretary further says:

"As the matter now stands the company is still, under the order of the court, prevented from entering into any agreement or reviving any policies which have lapsed, or doing anything except to the extent permitted by the special order of the court issued in reference thereto. However much disposed we might be, to re-instate your policy, *we cannot do so until we are clear of the court proceedings.* Then we *can give the matter further consideration.* We, of course, can make no promise to hereafter restore the policy on the payment of the premium, and can only say that we will consider such facts as you may have to present when we are able to act as a company."

Here the matter was left to rest until August, 1878, when correspondence began between the company and the complainant's solicitors. Now, if it be said that in March, 1878, the complainant was thus advised that the court in New York had in July, 1877, authorized the payment of premiums to the United States Trust Company, and that the complainant should then either have made payment, or within sixty days thereafter have transmitted his policy, duly receipted, and asked for a paid-up policy, it may well be replied that in the

preceding February the secretary of the company had asserted to the complainant that his policy was already forfeited; and the statements in the letter of March 9th, just recited, were such as to naturally lead the assured to understand that his policy had wholly lapsed, and that, if anything was thereafter done in the way of reviving it, it could only be done after the company was clear of the court proceedings, and after it could act as a company, and then only as an act of grace or favor. And thus the action of the company made it natural to suppose that nothing could be done by either it or the complainant until after its original power and authority to act were restored to it; and it was upon this theory, evidently, that the complainant's counsel acted from August, 1878, to March, 1879, as is shown by their letters of inquiry, in evidence, written to the company.

It is noticeable, also, that although the order of the court in New York, made October 29, 1878, by which the company was authorized to resume business, required notice of the order to be sent to policy-holders, and gave to the latter ninety days after sending such notice in which to pay past-due premiums, no notice in obedience to that order was sent to the complainant, and it was not until about February 25, 1879,—nearly a month after the ninety days had expired,—that the complainant, by his counsel, was informed of that order, although his counsel had been in correspondence with the company since August, 1878. Finally, in March, 1879, the company was requested either to recognize the policy by accepting the past-due premiums or to issue a paid-up policy on transmission of the original, duly receipted. The reasons assigned by the company for refusing so to do were that the notices before mentioned were duly sent to the complainant; that he did not write to the company; and that he made no attempt to ascertain the facts, either from the company or its local agent in Milwaukee,—most of which reasons were, as

we have seen, unfounded in fact. And further, as late as March 14, 1879, it was represented by the company that it was still in the hands of the court, with the order of October 29th yet in force and the application for a receiver still pending. Now, undoubtedly, if the circumstances were such as to excuse the complainant from literal compliance with the condition of the policy as to its transmission, duly receipted, it was his duty, if he would avail himself of the right to a paid-up policy, to act with requisite promptness after those circumstances ceased to exist. And I think such action was taken when a surrender was offered, in March, 1879. In the light of all the facts and circumstances of the case, I have no hesitation in holding that the complainant had at that time a right to take the necessary steps to secure a paid-up policy. After all that had transpired between the complainant and the company, from August 23, 1877, to March, 1879, I think the company should be held estopped to assert that the complainant forfeited his rights by failing either to pay the premium on the twenty-third day of August, 1877, or to transmit the policy receipted and to demand a paid-up policy within sixty days after such default.

I have carefully examined the authorities cited on the argument, and especially the case of *Universal Life Ins. Company vs. Whitehead*, very recently decided.[1] In that case the court held that the clause in the policies of this company requiring the policy to be transmitted, duly receipted, within sixty days after default in the payment of any premium, if a paid-up policy was desired, was a condition precedent; that time was of the essence of the contract, and that, to entitle the assured to a paid-up policy, he must have strictly complied on his part with the literal terms of that condition, notwithstanding the company was disabled by the proceedings against it in the courts of New York to issue a

[1] 58 Mississippi, 226.

paid-up policy. The question arose in that case on a demurrer to a bill to enforce the issuance of a paid-up policy, filed by the representative of the assured after the latter's death; and it was undoubtedly well decided that the election to take a paid-up term policy should have been made during the life of the assured, and on that ground alone the demurrer was sustainable. But, on the general question decided, it is to be observed that the case does not show that the bill set out the proceedings in New York against the company, further than to state the institution and general character of the proceedings, the injunctional order of the court of August 23, 1877, and that such order continued in force until October 29, 1878. In view of the manner in which the question there arose, the fact that the bill was filed after the death of the assured by his representative, and of the absence of many of the material facts brought out in the case at bar, I do not regard the decision in the Mississippi case as an authority that should be deemed controlling here.

Referring again to the proceedings in New York, it is, perhaps, worthy of observation that it appears from the order of the court made October 29, 1878, by which the company was declared solvent, that pending those proceedings the company procured releases of policies from the holders to the extent of over $7,000,000, and that policies which had become claims by the death of the insured and matured endowments, to the extent of over $600,000, had been released one-half by the holders thereof. These facts were recited in the order, in connection with the judgment of the court, that the company had become solvent, and show that there was cause for the institution of the proceedings, and that the disability of the company to act arose from its financial condition and the consequent intervention of the court; and that it was only removed when solvency was brought about by the cancellation of a large amount of its liabilities.

A decree will be entered requiring the defendant to issue and deliver to the complainant a paid-up policy for $600, on surrender of the original policy, properly receipted.

NOTE.—Where the Insurance company neglects to inform the assured of a change in the agent authorized to receive the premium, after adopting a rule to give such notice in all cases, and the assured tenders the premium in due season to the former agent, and is unable to find the new agent after reasonable inquiry, a failure to pay the premium within the 60 days will not forfeit the policy, but he will be entitled to what, under the circumstances, is a reasonable time. *Seamans vs. Northwestern Mutual Life Ins. Co.* 1 McCrary, 508.

So where the policy provided that in case it should become void after three annual premiums have been paid, the company will, upon demand within 30 days after forfeiture, issue a paid-up policy, the holder will be entitled to a paid-up policy if he demands it within a reasonable time after forfeiture, and he is not limited to the 30 days. *Johnson vs. Southern Mutual Life Ins. Co.* 9 Insurance Law Journal, 189.—[REPORTER.

MATTHEW GOTTFRIED *et al.* vs. THE CONRAD SEIPP BREWING COMPANY.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—JUNE, 1881.

IN EQUITY.

1. PATENTS—RIGHT TO REPLACE WORN PARTS OF MACHINE.—Where some of the parts of a patented machine wear out faster than others, the purchaser of such machine has the right to replace those parts as often as necessary so long as the identity of the machine is retained.

2. PATENT FOR PITCHING BARRELS—INFRINGEMENT.—The Gottfried patent for heating barrels, for the purpose of pitching, by means of a

blast of hot air, is not infringed by the use of a blast of superheated steam.

Banning & Banning, for complainants.

West & Bond, for defendant.

BLODGETT, J.—This is a bill to recover damages for the alleged infringement of a patent issued on the 3d of May, 1864, to the complainants, for an improvement in pitching the inside of barrels. Two defenses are set up: First, that the patent is void for want of novelty; and second, that the defendant does not infringe.

This patent has been before this court and the United States Circuit Court for the Eastern District of Wisconsin,[1] and nearly all the testimony in this record, on the question of novelty, was fully discussed and passed upon in those cases. I do not propose to re-examine the testimony bearing upon the question of novelty, as this case must, in my opinion, be disposed of upon the question of infringement; if the defendant does not infringe the complainants' patent, there is no occasion for discussing the question of novelty.

The defendant uses one machine constructed substantially after the specifications of the complainants' patent, but insists that it was purchased of the complainant Holbeck, and is used under a license from him. It is admitted that a machine was purchased by the defendant from Holbeck, but the complainants deny that this is the machine so purchased, because it is claimed that the essential working parts have been worn out and replaced with new parts; that the blower, pipes, and body of the furnace are renewals, and that the only parts of the old machine which remain are the ash pit and top of the furnace.

From the functions of the different parts of this machine, it is obvious that some of them will wear out much faster than

[1] See note at the end of the case.

others, and I think there can be no doubt that the defendant has the right to replace those parts as often as necessary, so long as the identity of the machine is retained. The proof in this case shows, to my satisfaction, that as the grates, pipes, and blowers were worn out, they were renewed, and therefore the identity of the machine is retained.

If, for instance, this patent had been upon a peculiar grate, and there had been no patent upon the other parts of the machine, when the grate was worn out, the defendant would have no right to put in another like it, because the grate was covered by the patent; but if the grate is only a part of the entire combination, I think it has a right to replace the worn out parts, and it cannot be said to be a different machine.[1]

It is also admitted that the defendant uses what is known in the trade as a "Krausch machine." This machine is constructed upon what seems to me, a substantially different principle from that of the complainants.

The complainants' invention operates by driving a blast of air by means of a blower through a bed of ignited coals into a chamber, from which it is conducted by a pipe into the barrel to be pitched, whereby the inside of the barrel is heated, so that the melted pitch can be quickly and evenly spread over the whole inside.

It is claimed by the complainants that the essential principle involved in their patent is the burning out of the oxygen from the air driven by the blast through the fire, so that, although it passes into the cask heated to a very high degree, it will not burn the inside of the cask; in other words, that it involves the process of heating barrels for pitching by means of a hot blast which is deprived of its oxygen before use, and thus rendered incapable of injurious burning.

I do not consider it necessary to discuss this question, for in

[1] *Chaffee vs. The Boston Belting Company*, 22 Howard, 217; *Wilson vs. Simpson*, 9 Howard, 109.

my view, the Krausch machine operates upon a different principle. It consists of a furnace or fire-box, containing a coil of steam-pipes so arranged, that the steam passing through the pipes will be superheated.

This superheated steam is let into the barrels, and heats the inside so as to melt the pitch, so that it can be evenly distributed or coated over the inside. The fire in the fire-box is stimulated or kept going by a steam exhaust which passes out of the top of the box so as to induce a blast through the fire, and the pipe used for letting the steam into the large casks is so arranged that it passes through a larger pipe from the upper part of the fire-box over the grate, and which might possibly, by reason of the draft occasioned by the jet of steam carry into the cask some of the burnt air and products of combustion, which are contained in the fire-box above the fire. But it is obvious that this burnt air would be only a very small part of the means by which the heating is accomplished, and is not the main process by which the heating is secured.

I think, therefore, the defendant does not infringe complainants' patent by the use of the Krausch machine.

The complainants' bill will, therefore, be dismissed, on the ground that no infringement of their patent is shown.

NOTE.—The patent involved in this case was before this Court in *Gottfried vs. Bartholomae*, 8 Bissell, 219, where it was held to be valid. The same opinion was reached by Judge Dyer in the Circuit Court for the District of Wisconsin, after an exhaustive examination of the subject, in *Gottfried vs. Best Brewing Co.*, reported in 17 Official Gazette, 675.

The patent subsequently came before Judge Gresham in the Circuit Court for the District of Indiana, who at first rendered an opinion against its validity, reported in 22 Official Gazette, 497; but on rehearing decided it valid. *Gottfried vs. Crescent Brewing Co.* 22 Official Gazette, 1447.—[REPORTER.

THE ZACH CHANDLER.

DISTRICT COURT — NORTHERN DISTRICT OF ILLINOIS — JUNE, 1881.

IN ADMIRALTY.

SEAMEN'S WAGES—WHEN VOYAGE ABANDONED.—Where seamen have shipped late in the season for a trip on the lakes, and inclement weather prevents the completion of the voyage, the master has the right to discharge the crew, in absence of special contract, upon equitable terms, which in most cases would be the payment of their wages until the vessel is laid up, and their transportation to the port of shipment or destination.

C. E. Kremer, for libellants.

Wm. H. Condon, for respondents.

BLODGETT, J.—This is a libel *in personam* against the master and owners of the schooner Zach Chandler, for wages and damages.

The material facts, which are undisputed, are that on the 13th day of November last, the libellants were shipped at the port of Chicago as seamen, to serve on said schooner at the rate of four dollars per day, for a voyage from Chicago to the port of Erie, in the State of Pennsylvania. No shipping articles were signed, and no stipulation made as to the rights of the respective parties in case the voyage should not be completed that season.

The schooner left the port of Chicago on the 13th of November, on said voyage, with a full cargo of grain. She encountered very cold, tempestuous weather, and was finally driven into Green Bay, and on the 23d of November made the

port of Escanaba, where she was laid up for the winter, and the libellants discharged, it being conceded that it was unsafe to prosecute the voyage farther that fall.

The master offered to pay the libellants the wages earned, at the contract price per day from the time of their employment up to the time of their discharge. They demanded that the expenses of their return to Chicago should be paid in addition to the wages, and this being refused, and the captain insisting that he would only pay the wages on condition of a full acquittance, they paid their own expenses to Chicago, and brought this suit.

It is conceded that the men worked faithfully and obeyed the commands of their officers during the time they were on board the vessel, and in all respects conducted themselves as obedient and capable seamen.

It is now contended, on the part of the respondents, that as the voyage was abandoned, and no freight was earned, there is nothing due the libellants, while the libellants insist that as a matter of strict legal right, they were entitled to stay upon the vessel until the completion of the voyage, whether it was that fall or the next spring, and to be paid the wages called for by their contract; that they were not to blame for the interposition of winter weather, and therefore had the right to complete their contract the next season, and that their employment continued until its completion.

Although the amount involved is not large, the principle in question is important, especially upon our northern lakes and rivers, where many voyages undertaken in the fall are liable to be delayed by the close of navigation until the ensuing spring.

This case does not come within the rule applicable to voyages which are abandoned and broken up by reason of shipwrecks, or such marine disaster as makes the completion of the voyage impossible; because the intervention of winter

weather, which compels the master to lay up his vessel at an intermediate port only delays the voyage until the opening of navigation in the ensuing season, when it may be resumed and completed.

It is also admitted that the rate of seamen's wages for voyages undertaken late in the fall on our lakes is much higher than for similar services in the spring.

Under these circumstances it seems to me that the court should hold a contract like the one now before us, to be made by both parties, in view of the contingency that it is liable to terminate by the closing of navigation from the inclemency of the weather before the completion of the voyage. It is a contract for the voyage from the port of departure to the port of destination, if it can be completed that season. If the season closes by the setting in of winter weather, so as to make the further prosecution of the voyage unsafe for life or property, then the master must have the right to lay up his vessel at any intermediate port of safety, and to discharge his crew; because, to be compelled to pay full wages during the winter and until the completion of the voyage in the spring, might not only consume the entire earnings of the voyage, but even leave the vessel burdened with debt.

If the master cannot terminate the contract with his men on some equitable terms, when he is compelled to lay up his vessel, he would be tempted to take too great risks in pursuing and attempting to complete the voyage, and thereby endanger not only the lives of his men but the property in his charge, merely because he was under so heavy an obligation to his men, if he must either get them to their place of destination that fall, or be liable for their wages and support during the entire winter. But a master ought not to have the right arbitrarily to lay up his vessel and discharge his men at a way port except upon equitable terms to them.

From the nature of the case, the master must exercise his

discretion as to the extent to which he will pursue and attempt the completion of his voyage, and the men, as a rule, must perform their duty by working the ship under his orders until he decides to lay up. To disobey orders and refuse to work the ship would be, under most circumstances, mutiny. But when the master decides to lay up and to exercise his right to terminate the contract, he should be allowed to do so only on condition of making a just and proper provision for the men; he should certainly pay the wages which have been earned at the stipulated rate up to the time of the laying up of the vessel. In this case I have no doubt that equity required the master to pay the expenses of the men back to the port of departure.

Such may not be the rule in all cases, and I do not conceive it necessary in this case to lay down a rule for all cases. Possibly cases may occur where it would be more consonant with the rights of all that the master should pay the expenses of the men to the port of destination rather than to the port of departure; especially when the vessel was laid up nearer the port of destination than the port of departure, because, if by the contract the master had the right to discharge his crew at the port of destination, they could not complain if furnished transportation to that point. This would leave the men just where they would have been left if the voyage had been completed that fall. Of course the parties can by their contract expressly provide for and settle their respective rights in such a contingency as this, and their contract, and not the rule laid down in this case, would then govern. I only intend to decide what the rights and obligations of the parties to this suit are, and other suits coming within the facts of this case.

I am surprised to find there is a great dearth of direct authority upon the questions involved in this case. The case of *The Lioness*[1] decided by Judge Treat, of the Eastern

[1] *Worth vs. The Steamboat Lioness*, 2 McCrary, 208.

District of Missouri, was analogous in many of its features to this. The Lioness was a tow boat engaged upon the Ohio and Mississippi rivers, her home port being Pittsburgh. Her crew were shipped in the Spring for the season. The boat was laid up by the ice at a small landing about twenty miles below St. Louis. In that case the learned judge allowed the men their wages until the time of their arrival at their home port as well as their expenses. I do not find any warrant in the authorities cited in that case for the payment of wages, as a rule, until the arrival of the crew at the port of shipment—although that case was undoubtedly rightly decided in view of its special facts.

In the case of an American vessel sold in a foreign port before the completion of her voyage, the master has a right to discharge his seamen, but he must pay them three months' wages and their expenses home, or make some suitable provision approved by the American consul at the port where the discharge takes place, but this law affords no criterion or rule for the government of the master in a case like this.

I am, therefore, of opinion that the report and finding of the commissioner in this case should be sustained. The exceptions to the report will be overruled and a decree entered in conformity with the recommendation of the commissioner awarding the libellants their wages and their expenses from Escanaba to Chicago, together with the costs of this suit to be taxed.

NOTE.—On appeal to Drummond, Circuit Judge, this decision was fully affirmed by him, thus establishing the law on this question within this circuit.—[REPORTER.

JAMES H. PATTEE *et al.* vs. MOLINE PLOW COMPANY *et al.*

CIRCUIT COURT — NORTHERN DISTRICT OF ILLINOIS — JUNE, 1881.

IN EQUITY.

1. PATENTS FOR CULTIVATORS—NOVELTY.—The patents of complainants and of the patentees under whom they hold, for improvements in cultivators, so far as they claim an exclusive right to the use of an arched axle, with a two-way joint or hinge in the middle, by which lateral and vertical motion of the plow beam is secured, and the plow held in an upright position, were anticipated by prior patents, and cannot be sustained, for want of novelty.

2. PATENT FOR COMBINATION—The fact that complainants had a patent for a certain combination of old parts of a machine, did not impair the right of defendants to combine the same parts, so long as they did not use the same combination shown in complainants' patent.

3. The court finds that Pattee, the complainant, was not the first to conceive and embody in working form, the idea of a tongueless straddle-row cultivator.

4. Discussion of various patents for improvements in cultivators.

A. McCallum, for complainants.

West & Bond, for defendants.

BLODGETT, J.—The bill in this case alleged the issue of the following patents by the United States Patent Office:

1st. Patent issued to J. Schroeder, September 24th, 1867; re-issued to complainants, February 6, 1877.

2nd. Patent issued to M. Eichholtz, April 6th, 1869; re-issued to complainants, June 12, 1877.

3d. Patent issued to C. P. Norton, October 18, 1870; re-issued to I. P. Pillsbury, August 26, 1873.

4th. Patent issued to James H. Pattee, March 5, 1872; re-issued to complainants, October 6, 1874.

5th. Patent issued to T. Poling, August 13, 1872.

All of which patents were for improvements in cultivators, and have come by assignment into the ownership and control of the complainants.

It is further charged that the defendants, disregarding the exclusive right secured by the aforesaid patents to the complainants, have made and sold, within this district, cultivators according to, and in which are embodied, devices and inventions covered by the said patents, as the same now stand re-issued.

The bill contains the usual prayer for an injunction, and an accounting for profits and damages.

The defendants, by their answer, deny the validity of the complainants' several patents.

First. For want of novelty.

Second. Because the re-issued patents are for different inventions than those shown by the original specifications and drawings.

Third. They deny that the cultivators made by them infringe all or any of the complainants' patents.

It appears from the proof, as part of the history of the patents in question, that James H. Pattee, one of the complainants, devised what he considered a valuable improvement in cultivators, involving what he deemed a radical innovation on the then mode of constructing this implement, which was to make a two-horse straddle-row cultivator without a tongue or pole—in other words, a tongueless cultivator.

The Pattee model, which is in evidence, shows the general idea of his invention—a cultivator, with the ordinary device of an arched axle for straddling the rows of corn or other plants to be tilled; the axle, jointed near the horizontal arms which form the journals for the wheels, and supported on

wheels, with the plow beams hinged to the axle, by joints which allow them to oscillate or swing vertically and laterally.

For this device he obtained the patent of March 5th, 1872, which was subsequently re-issued on the 6th of October, 1874.

After this patent was obtained the complainants procured assignments of the Schroeder, Eichholtz and Norton patents—all of which were cultivators provided with tongues as an element of their organism—and secured re-issues thereof, covering certain features which are assumed to be essential to the tongueless machine, and they have also obtained an assignment of the Poling patent, which is a few months later in date than the Pattee patent.

What may be called the Pattee cultivator has two characteristic features:

1st. It operates without a tongue or pole, the draft animals being attached in such a way as that each animal, within certain limits, draws his own plow, the draft being distributed to each animal by means of the joints in the axle.

2d. It has a jointed axle, or coupling yoke, by which the two plows are held together and made to operate at a certain distance apart.

It seems, for the purposes of this case, to be conceded that, in order to make this class of cultivators practical, there must be some provision for the flexion of the axle, so that each horse shall move its own plow, or the plow to which it is directly attached, independently of the other, to a limited extent. That is, if the two plows are rigidly coupled or connected together, and one horse moves faster than the other, or deflects from the line of draft, the machine will have a sideways motion, which will throw it upon, or too close to the rows of plants it is intended to cultivate, or require extra effort on the part of the plowman to keep it in line. A joint of some kind, then, which shall operate to prevent the side-

ways action spoken of, and also divide the draft between the horses, is deemed a special desideratum in this class of cultivators and one of their chief merits.

The flexion is obtained in complainant's machine, under the Pattee patent, by means of two joints, one at each end of the axle A, as it is termed in the specification. The joints are made by means of the side plates, A and B, and a spindle, as shown. From these side plates project the horizontal arms which form the journals for the supporting wheels, the plow beams being attached to the axle just outside the joints, that is, between the joint and inner end of the hub. These joints allow a free backward and forward motion, and the combined parts make the arched jointed axle described.

The principal defendant in this case, the Moline Plow Company—the other defendants being officers of the corporation and only charged with violating these patents by their action as such officers—makes a tongueless, straddle-row cultivator, which has an arched or bent axle, with wheels revolving upon the journals at the end of the axle, and plows attached to the axle by a joint allowing the plows to swing vertically and laterally, and the axle jointed in the middle of the arch by a torsion joint, which is prevented by lugs from turning beyond a certain distance; but the joint is placed in the middle of the axle, instead of having two joints at the spring of the arch as shown in the Pattee patent.

It is insisted on the part of the complainants, that it is by the use of this jointed axle—that is, the axle jointed in the middle—and in the peculiar two-way joint by which the defendants' plow beams are attached to the axle so as to secure the requisite lateral and vertical motion to the plows, that certain claims in all these patents owned by the complainants are infringed. In other words the complainants insist that the defendants' joint in the middle of their axle is but the equivalent of the two side joints in the Pattee axle, and

is the same joint which is shown in the Pattee, and at least anticipated in the devices of Schrœder, Eichholtz and Norton.

The Schrœder machine was a straddle-row cultivator, with a frame consisting of wheels, axle and tongue, but with a peculiar device for securing the plows to the frame by means of what he terms an "arched beam-yoke," which was bolted or pivoted at its centre to the tongue in such a manner as that

"Either end of said beam yoke may be advanced or receded with its respective plow without disturbing the parallelism of the plow beams,"

which are hinged or jointed to the yoke in such manner as to permit of their being oscillated laterally or vertically, and yet to sustain the plows in their upright positions without rear connections.

The plows are attached to this vibrating bar or "arched beam yoke" by a two-way joint,—this two-way joint allowing a vertical and lateral motion to the plow,—and at the same time the joint is so constructed as to hold the plows in an upright position.

The arched beam yoke consists of the centrally vibrating beam, or evener, and the pendant side arms which drop from the ends of the evener.

The joint by which the beams are attached to the pendant, consists of two flat pieces of metal, one bolted to the top, and the other to the under side of the end of the plow beam, and bent so as to come together forward of the end of the beam; a bifurcated or split plate is made to pass on each side of the pendant, and is attached thereto by a bolt fastened through both parts of the split plate and the pendant, by which means the vertical movement of the joint is obtained. This split plate is carried back and flattened so as to pass between the two plates which embrace the end of the plow-beams, and attached thereto by a bolt, so as to secure the lateral movement.

The plows are drawn by means of a forked or two pronged

draft bar, one limb of which is attached to the lower end of the pendant part of the yoke, and the other either to the upper end of the pendant, or to the end of the evener, and the whiffle-trees are attached to the forward end of these two bars, where they converge into a hook, or other device, for attaching them.

The claims of this patent as re-issued, which the defendant is alleged to have infringed are the first, second, and third, which are as follows:

1. "Two plow beams B B, connected together by an elevated beam yoke, A, so that either may operate in advance of the other, while both are drawn forward in the line of progression by draft animals attached to each side of the machine, so that each animal draws in a manner its adjacent plow, the attachment of the plow beams to said yoke being by joints which permit the moving of the beams freely and independently in a lateral direction, combined and operating substantially as described, and for the purpose specified.

2. "Two plow beams, B B, connected together by an elevated beam yoke, A, so that either may operate in advance of the other, while both are drawn forward in the line of progression by draft animals attached to each side of the machine, so that each animal draws in a manner its adjacent plow, the attachment of the plow beams to said yoke being by joints which sustain the plows in an upright working position without rear connections or other support, and permit of their being moved or oscillated freely in a lateral direction, combined and operated substantially as described, and for the purposes specified.

3. "Two plow beams, B B, connected together by an elevated beam yoke, A, so that either may operate in advance of the other, while both are drawn forward in the line of progression by draft animals attached to each side of the machine, so that each animal draws in a manner its adjacent plow, the attachment of the plow beams to said yoke being by joints, which sustain the plow in an upright working position without rear connections or other support, and permit of their being moved or oscillated freely in a lateral or vertical direction, combined and operating substantially as described, and for the purpose specified.

5. "The draft bars F F, hinged to the beam yoke A, and combined to operate with said beam yoke and plow beams B B, substantially as described, and for the purpose specified."

It will be seen that the first claim covers the two plow beams, connected together by a beam yoke so arranged that

one may operate in advance of the other, and the plow beams being attached to the yoke by joints which permit each beam to move freely in a lateral direction, combined and operated substantially as described. In other words, as I understand and construe this claim, it is for a combination of these plow beams; the particular and special kind of beam yoke; and the joints by which the plow beams are hinged to the yoke, so as to secure the lateral motion.

The second claim is for precisely the same combination of parts, with the additional statement that the joints by which the plow beams are attached to the yoke, are to support the plows in an upright working position, and permit of their being oscillated in a lateral direction.

The third claim is for the same combination of parts, with the additional statement that the joints, attaching the plow beams to the yoke, must permit the beams to be moved or oscillated freely in a lateral or vertical direction.

The fifth claim is for the combination of draft bars, connected with the beam yoke and plow beams as described.

By the first claim he covers as new the combination of certain parts as shown, and the joint allowing a lateral motion to the plows; and by the second and third claims he covers the other functions of the same joint, not the joint as such, on the assumption that no such joint was ever before made, but the result or operation of the joint; by the second claim, that the joint sustains the plows in an upright position, and in the third claim, that it allows the plow to move laterally or vertically.

This joint, as shown in his mechanism, is simply a two-way joint, and when used in this combination as described, permits all these movements or functions, as a necessary part of its action in the mechanism, and also holds the plow in an upright position, and I cannot see how these claims for the result or functions of the joint can be deemed valid. It is

the mechanism which is the subject-matter of the patent, and not the result of the mechanism.

The Eichholtz patent is for a tongued cultivator, parts of which are so arranged and combined as to dispense with wheels, and where each draft animal was attached to his own plow. It is not a tongueless cultivator, as will be seen, but consists of a beam yoke, coupling the plow beams together and to which the plow beams are attached by a peculiar joint described, which allows the plows to be operated vertically and laterally; but they could not be dropped below a certain line, by reason of the extension of the heel of the joint, as I call it, backward from the pivot. The claims in this re-issued patent which are brought in question in this case are:

1. "The combination of two plow-beams and the beam yoke, connected together by joint pieces so that the yoke sustains the beams in upright working position without their being connected together in rear, and is itself supported in an elevated position, the beams having also lateral and vertical motion, substantially as and for the purpose specified."

Or, as I understand it, this claim is for a combination of this special kind of beam yoke, so arranged as to support the plows in a vertical position upon the yoke.

"2. Two plow beams B B, connected together by an elevated beam yoke, A, so that either may operate in advance of the other while both are drawn forward in the line of progression, the attachment of the plow beams to said yoke being by joints, which sustain the plows in an upright working position without rear connections or other support, and permit of their being freely moved independently in a lateral direction, and in a limited vertical direction, permitting the necessary vertical movement of the plows and sustaining the beam yoke in an elevated position, combined and operating substantially as and for the purpose specified."

It seems to me that the only material feature of this combination which is not found in the Schroeder patent, is the peculiar joint by which the plow beams are attached to the yoke, so that the yoke sustains the plows in an upright posi-

tion, and permits of a limited lateral and vertical motion of the beams.

It may be remarked, and that is all I propose to say in reference to this joint, that it is but another form of a two-way joint. The pivot upon the yoke allows of a lateral motion to a limited extent; the peculiar joint, by which the plow beam is attached to the plate pivoted upon the yoke, allows a limited motion upwards and downwards.

The machine covered by the Norton patent is a frame, mounted on runners instead of wheels, and the frame is so jointed as to permit one plow to advance ahead of the other, and the plow-beams to be vertically and laterally oscillated, by the peculiar mechanism shown.

This sled, as it may be called, is arranged with cross pieces, connected by runners and a tongue in such a manner as to produce the movements of an ordinary parallel rule, by means of which one plow may be drawn slightly ahead of the other, and the irregularities of the working of the team compensated for, to a certain extent, by the mechanism shown.

The plow beams are attached to one of the forward vibrating bars, in connection with this parallel rule motion, so as to allow of a limited lateral and vertical motion, but are held upright by a peculiar arrangement of the joints. The claim in this re-issued patent is for

"The main frame A B, and runners E, arranged, relatively to each other, so that either side of the main frame, together with its runner, may be advanced, and either plow beam vertically or laterally oscillated, without disturbing the parallelism of the runners with each other or with the line of progression, substantially as described, and for the purpose specified."

It will be noticed that running all through these re-issued claims is substantially the same idea, the same leading thought: That each plow is to be advanced in the line of progression without disturbing the parallelism of the beams,

and without materially disturbing the action of the other plow, within the limited scope of this allowable motion.

The peculiarity of the Pattee invention I have already sufficiently described.

The claims which it is insisted the defendant infringes are:

"1. The combination, in a walking straddle-row cultivator, of the following instrumentalities, viz.: two wheels, D D, axle A, and two plow beams, K K, each beam carrying a handle and one or more shovels or plows, and independently hinged to the axle, so as to be retained in working position without rear connection or support, and moved freely in a lateral, vertical and horizontal direction, substantially as and for the purposes specified.

"4. The combination of the plow beams K K, axle A, and wheels D D, the latter being hinged or pivoted to the axle to permit of one side moving in advance of the other, substantially as described, and for the purposes specified."

The Poling patent describes a tongueless straddle-row cultivator, the forward ends of the plow-beams of which run upon castor wheels; and the plow-beams are held together by an arched, or elevated beam yoke jointed in the middle.

In the Poling patent the castors are attached to the axle, as he calls it, and the plow beams are also attached to the axle by a joint, in a way which admits of lateral motion only. They are rigidly attached, so far as any vertical motion independent of the yoke or axle is concerned, but the vertical motion of the plows is obtained by the joint in the axle. The plow-beams are attached to the yoke by a joint, which permits of their free lateral movement, but the needful vertical motion is obtained by means of the joint in the middle of the yoke or axle.

I have thus described and discussed briefly each of the complainants' patents. The next inquiry is as to the novelty of those devices, and whether the defendant infringes the same.

From the proof in this case it is quite clear to me that

Pattee was not the first to conceive and embody in a working machine the idea of a tongueless straddle-row cultivator. The first machine, shown in the proof, which embodies this idea is that patented by Isaac Constant, in November, 1851. It is a tongueless straddle-row cultivator, with all the elements for a working machine of that description, and so arranged as to be, what may be called in this art, self-sustaining, that is, it will stand upon its own supports.

This was also done by Arnton Smith, in January, 1855; by Whitely, in 1860 to 1865; by E. W. Vangundy, in February, 1864; by Pratt, in October, 1864, and by Adam Young, in November, 1866.

All these show cultivators constructed without a tongue, with two plow beams held together by a yoke, each plow drawn by its own draft animal and operating independently of the other.

The specifications, in the patent of Arnton Smith, show the idea which he intended to embody in his machine very clearly as follows:

"Be it known that I, Arnton Smith, of the county of Macoupin and State of Illinois, have invented a new and useful improvement on the plow, and I do hereby declare that the following is a full, clear and exact description of the construction and operation of the same, reference being had to the annexed drawings, making a part of this specification.

"The nature of my improvement consists in so constructing them that they shall admit of a free and independent motion of each other by means of the hinged slide rods D, in combination with the bar E, and the coupling rod F, said rod F answering the double purpose of a coupler and a double-tree, and thus dispense with the weight of a double-tree usually employed. * * *

"Having thus connected the two plows together, as before described, *and attached a horse to each plow*, I proceed to plow two furrows at a time. By placing them between two rows of corn I can plow next to each row and throw the dirt either up to, or away from, the corn; or I can place the two plows on each side of a row of corn and plow each side of the corn row, and throw the dirt away from the corn, or throw the same towards it, and thus hill up the corn. * * *

"I do not claim any of the separate parts of my plow as new, and I am

aware that two plows have been united somewhat like mine, but so that both must advance together, and one must, when raised alone, rotate upon and affect the other, while my separate plows may move freely."

He shows, in his plans, the two plow beams held together by a coupling rod, as he calls it, and to which the plows are jointed by swivel joints. For the purpose of holding his plows in an upright position he has a rear connection, or shackle bar as it is termed in the complainants' devices, shackling the two plows together. Here, then, we have in Smith's device, two plows, jointed to a beam yoke in such a manner as to allow of a lateral and vertical motion to each plow independently of the other, and each animal draws his own plow. This is the first beam yoke, shown in the proof in this case; but the disclaimer by Smith in his specification, intimates certainly that other inventors or manufacturers had adopted the coupling rod or beam yoke prior to him.

Nor was the idea of an arched beam yoke new to Schroeder, who is the first and oldest of the complainants' patentees. An arched beam yoke is shown in the Constant patent of 1851. This beam yoke is arched, so as to pass over the plants to be cultivated, and yet operates to hold the two plow beams together.

The same idea is also shown in the patents of Saville, Vangundy and Pratt, and the model of Whiteley. I read from the specifications of Vangundy's patent of 1864, this extract:

"The central portion of the front bar D, (that is the arched coupling bar) is bent upwards so as to pass over the tops of the rows of growing corn or other grain, without injuring the crop, and the rear bar E is forked for the same purpose."

Nor, was the idea of a jointed beam yoke or axle, which would allow one plow to advance to a limited extent without the other, new to Schroeder, Eichholtz, Norton, Pattee or Poling. Constant made provision for it, by the pivoting of his beam yoke to the beam as shown in his model, thereby

securing the evener motion of Schroeder and Eichholtz, or parallel rule motion of Norton and Pattee.

Vangundy made express provision for it in his specification, as follows:

"As the retaining pins, c, c, c, c, act as pivots, the longitudinal playing of the ends of the bar D, upon the pins, b, b, permit to a certain degree, the independent movement of the two draught beams in parallel lines, whilst a similar play of the ends of the bars E and F, upon their retaining pins, c, c, within the slots in the share beams B B', permit the end of either draught beam to be elevated or depressed, independent of the other."

So that here is express provision for the independent action of each plow to a certain extent, and provision also for the lateral and vertical movement which is shown in the patents of the complainants.

Pratt says in his specifications:

"The invention consists in connecting together two plow beams, arranged in such a manner that each beam will have an independent movement, or one to a certain extent independent of the other, whereby the implement is placed more under the control of the operator than usual, and managed with less labor and with less fatigue to the team."

* * * * * * * * *

"One draught animal is attached to each beam A, and it will be seen from the above description, that each beam A, in consequence of being connected by the cross bars D D, as above shown, is allowed a certain independent movement longitudinally, and may therefore be managed and operated with facility in case of meeting with obstructions, and the implement is not so liable to be strained or racked as when the rigid frames are used, nor the team so much fatigued."

"In plowing or cultivating corn I remove the bars D D, and put on curved metal bars H, as shown in figure 3."

Here we have, in the Pratt device, all of the substantial idea shown in the Schroeder. That is the connection of the plow beams by a beam yoke, so that they are held together, and the beam yoke is arched, so as to pass over the rows of plants, and each plow moves to a certain extent independently of the other, by means of the joints at the point where the yoke is attached to the plow beams. Indeed it seems to me that

Schroeder's "arched beam yoke" and Pattee's arched and jointed axle are fully anticipated in form of construction, function and mode of operation, by Pratt's "curved metal bar H."

And it is also noticeable that Pratt claims these characteristics as the patentable features of his devices, whilst they were not originally claimed (or at least allowed to them) by Schroeder, Eichholtz, Norton or Pattee.

In 1865, W. S. Weir attached the plow beams of his cultivator to an arched axle, as shown by the proofs, by a two-way joint, which held the plows in an upright working position without rear connections, and permitted all the lateral and vertical motions claimed in the Schroeder patent. While Adam Young, in November, 1866, and George E. Owens, in August, 1871, show the two plow beams of a straddle row cultivator connected together by an arched yoke with a joint in the middle, and for substantially the same purpose as used in Poling's device. Young says in his specifications:

"In order to arrange the connections between the plows so as to pass over the tops of corn leaves, after the latter have considerably advanced in growth, as is always the case with the late or final plowing, the connecting beams between the two plows are constructed in a peculiar manner by taking them in a vertical direction above each beam, and conducting them horizontally across toward the other plow. There are two of these bent beams attached to each beam, and to each other in the horizontal part of them, so as to form a pair. Each pair of these beams is coupled together by a peculiar clamp arrangement, which admits of a ready adjustment of the parts to accommodate the width of the rows as before recited. * * *

"The sockets *a* are permitted to turn easily around their vertical axis, so as to allow one of the plows to be drawn ahead of the other without wrenching or straining any of the parts, and the beams C C' are pivoted to the sockets *a*, or the handle B', so as to allow the requisite lateral motion of these parts."

Owens, in 1871, describes a tongueless straddle row cultivator, with an arched beam yoke joined in the center by a ring, and he says that this arrangement permits one section

or division of the implement to be eight to twelve inches in advance of the other.

There is then shown, by the proof in this case, that, at times antedating all of the complainants' patents, all of the ideas or peculiarities of the complainants' several machines, the arched yoke of Schroeder and Eichholtz and the two-way joints, were adopted and are older than the date of either the Schroeder or Eichholtz patent. The idea of the jointed axle of Pattee, by which the rigidity of the cultivator frame is avoided, and each draught animal operates his own plow to a certain extent independent of the other, is older in the art than either of the inventions covered by the complainants' patents. Not that, in either of these preceding machines, there is shown just the same kind of joint, structurally considered, as that shown in the Pattee patent, or an arched beam yoke precisely like that of Schroeder, but the idea and function of Pattee's axle and Schroeder's beam-yoke seem to have been anticipated, and worked out in practical machines, by the several inventors from whose specifications I have so fully quoted.

I, perhaps, should not leave this branch of the case without referring to the evidence touching the Whiteley cultivator, which appears in this record. This cultivator, a model of which is introduced in evidence, was never patented, but the proof shows that it was constructed and in use in the vicinity of Springfield, Ohio, from 1860 or 1861 up to 1873 or 1874, and the evidence shows that some hundreds of them were constructed and put to use in that locality, and that it was a popular and useful machine. It is true there is some dispute in the record, as to the precise time in which Whiteley completed and manufactured his machines. But I think the clear preponderance is in favor of the defendants' assumption, that these machines were made as early as 1860, and that Whiteley continued the manufacture of them for several years there-

draft bar, one limb of which is attached to the lower end of the pendant part of the yoke, and the other either to the upper end of the pendant, or to the end of the evener, and the whiffle-trees are attached to the forward end of these two bars, where they converge into a hook, or other device, for attaching them.

The claims of this patent as re-issued, which the defendant is alleged to have infringed are the first, second, and third, which are as follows:

1. "Two plow beams B B, connected together by an elevated beam yoke, A, so that either may operate in advance of the other, while both are drawn forward in the line of progression by draft animals attached to each side of the machine, so that each animal draws in a manner its adjacent plow, the attachment of the plow beams to said yoke being by joints which permit the moving of the beams freely and independently in a lateral direction, combined and operating substantially as described, and for the purpose specified.

2. "Two plow beams, B B, connected together by an elevated beam yoke, A, so that either may operate in advance of the other, while both are drawn forward in the line of progression by draft animals attached to each side of the machine, so that each animal draws in a manner its adjacent plow, the attachment of the plow beams to said yoke being by joints which sustain the plows in an upright working position without rear connections or other support, and permit of their being moved or oscillated freely in a lateral direction, combined and operated substantially as described, and for the purposes specified.

3. "Two plow beams, B B, connected together by an elevated beam yoke, A, so that either may operate in advance of the other, while both are drawn forward in the line of progression by draft animals attached to each side of the machine, so that each animal draws in a manner its adjacent plow, the attachment of the plow beams to said yoke being by joints, which sustain the plow in an upright working position without rear connections or other support, and permit of their being moved or oscillated freely in a lateral or vertical direction, combined and operating substantially as described, and for the purpose specified.

5. "The draft bars F F, hinged to the beam yoke A, and combined to operate with said beam yoke and plow beams B B, substantially as described, and for the purpose specified."

It will be seen that the first claim covers the two plow beams, connected together by a beam yoke so arranged that

one may operate in advance of the other, and the plow beams being attached to the yoke by joints which permit each beam to move freely in a lateral direction, combined and operated substantially as described. In other words, as I understand and construe this claim, it is for a combination of these plow beams; the particular and special kind of beam yoke; and the joints by which the plow beams are hinged to the yoke, so as to secure the lateral motion.

The second claim is for precisely the same combination of parts, with the additional statement that the joints by which the plow beams are attached to the yoke, are to support the plows in an upright working position, and permit of their being oscillated in a lateral direction.

The third claim is for the same combination of parts, with the additional statement that the joints, attaching the plow beams to the yoke, must permit the beams to be moved or oscillated freely in a lateral or vertical direction.

The fifth claim is for the combination of draft bars, connected with the beam yoke and plow beams as described.

By the first claim he covers as new the combination of certain parts as shown, and the joint allowing a lateral motion to the plows; and by the second and third claims he covers the other functions of the same joint, not the joint as such, on the assumption that no such joint was ever before made, but the result or operation of the joint; by the second claim, that the joint sustains the plows in an upright position, and in the third claim, that it allows the plow to move laterally or vertically.

This joint, as shown in his mechanism, is simply a two-way joint, and when used in this combination as described, permits all these movements or functions, as a necessary part of its action in the mechanism, and also holds the plow in an upright position, and I cannot see how these claims for the result or functions of the joint can be deemed valid. It is

after. This Whiteley machine certainly embodies the main ideas that are developed, perhaps with more mechanical skill but not inventive genius, in the latter devices of Pattee and Poling. The time when the Whiteley machines were first made and introduced, is fixed by the testimony of the witnesses as during the war, and it is hardly possible that a person could be mistaken as to a fact which occurred during a historical period of such impressive interest as our late civil war.

Arched and jointed beam yokes, then, being old, and two-way joints being old, the complainants' inventors could have patents only for their special devices and combinations. These patents may be valid as shown. That is, the Schroeder patent may be a valid patent for the combination of the peculiar parts which Schroeder shows in his patent, and claims as his peculiar invention—his peculiar arched beam-yoke or evener, and his peculiar joint by which he sustains the plow may be valid, and the combination of them, to make such a mechanism as he shows, may be valid. He does not claim, in fact, to have invented a beam-yoke, nor a two-way joint; he does not assert that he is the first to have made a joint of this character, but simply puts it into his combination.

So, too, an arched beam-yoke, jointed in the middle, as shown in Poling's patent, must be confined to his special joint; and this was evidently the view of the Commissioner of Patents. Poling describes his device,—his arched axle, and then is allowed one claim, as follows:

"Having thus described my invention, I claim as new, and desire to secure by letters-patent, the bars A, constructed substantially as herein shown and described, and pivoted to each other at their inner ends, to adapt them to receive the plow-beams and draft, as and for the purpose set forth."

He describes the peculiar kind of axle. He describes how he secures the peculiar kind of joints shown, by cutting the axle in two, and pivoting the parts together. It is true, this

is a torsion joint, the same as is used by the defendant, but it is a peculiar kind of torsion joint; and inasmuch as torsion joints were not new, and the idea of a joint in the middle of the axle had been shown by Owens, I think Poling must be limited to his peculiar joint. He cannot claim the idea of a joint in the middle of the arch or axle, because that had been done by preceding inventors.

The defendants' arched yoke is a peculiar device by itself. It is an arched axle with a hinge in the centre. It differs not essentially, perhaps, in its mode of operation, from Poling's, but it has another kind of joint—a different joint from Poling's; not but what it has the same function, but Poling had no right, in the state of the art, to cover the function, or to cover every joint at that place. He was not the first to joint the arch or axle of a cultivator in the middle for the purpose of obtaining the result which he obtained. The field was open to the defendant to make another kind of joint in the same place, which might accomplish the same result as Poling's, without infringement.

I therefore come to the conclusion that the defendant, in its combination of parts to produce its cultivator, does not infringe upon any of the special devices which are shown and covered by the complainants' patents. It is true that the defendant has an arched axle, but arched axles were old, older than Schroeder or any of the complainants' patents. It is true that the defendant's axle is jointed in the centre, but an arched axle or beam yoke jointed in the centre was older than Poling. It is true that defendant used a two-way joint, by which lateral and vertical motion of the plow-beam is secured, and the plow is held in an upright position, but this had been done by Wier and other inventors, long before any of the complainants' patents were issued.

The patents of Schroeder, Eichholtz, Norton, Pattee and Poling, all seem to me from the proof to be mere combina-

tions of old parts, and as I have said, may be valid as such combinations, but the defendant had the same right to combine other or the same parts so long as it did not use the same combination shown in complainants' patents, which I find it does not.

The bill is dismissed for want of equity.

WOVEN WIRE MATTRESS COMPANY vs. ZALMON G. SIMMONS *et al.*

CIRCUIT COURT—EASTERN DISTRICT OF WISCONSIN—JUNE, 1881.

IN EQUITY.

1. PATENTS—BEDSTEAD FRAMES—CONSTRUCTION OF RE-ISSUED PATENT No. 7,704.—In re-issued letters patent No. 7,704, granted to the complainant for an improvement in bedstead frames, the *first* claim must be construed to mean a combination of side bars, inclined double end bars, and elastic coiled-wire fabric attached only to the end bars, with the end bars of the frame elevated above the side bars, so that the fabric is suspended above the side bars from end to end of the frame, and the *second* claim must be held to mean the combination of the side bars, standards, inclined double end bars, and elastic fabric, arranged as and for the purposes specified.

2. INFRINGEMENT.—In defendants' bed bottom, the end bars are not inclined, and are not elevated above the side bars, but rest directly upon them. *Held*, in view of the state of the art at the time of the first patent, that the absence of inclined end bars in defendants' frame in connection with other differences, relieves the defendants from infringement.

Coburn & Thacher, for complainant.

West & Bond, for defendants.

DYER, J.—This is a suit in equity for an injunction, and to recover damages on account of the alleged infringement of re-issued letters-patent granted to the complainant, May 29, 1877, for an improvement in bedstead frames, of which J. M. Farnham was the inventor and original patentee. In the specifications of the re-issue the patentee describes the invention as follows:

"My invention relates to a new frame which is provided with an elastic or flexible sheet or fabric for the support of the bedding. The frame is made of proper size to be inserted within any ordinary bedstead. My invention consists in the combination of the side bars and end bars, with the end bars elevated above the side bars in such a manner that the elastic fabric, stretched from end bar to end bar, can extend the entire width of the frame over the side bars, and an elastic fabric attached to the end bars only of the frame; and it also consists in the combination of the side bars and end bars of the frame connected together by standards or corner irons, B. By this arrangement the fabric is securely held * * *. It will be observed that the purpose of this method of attaching the fabric to the frame is to give to the fabric its greatest elasticity, by attaching it at its ends only, and at the same time making it as nearly the full size of the frame as could be well done, while it is substantially free from contact with the frame when used, excepting at its ends, where it is rigidly secured to the end bars."

More detailed description of the device in the specifications is as follows:

"To the ends of each side bar are secured, by means of bolts, *a*, *a*, upward projecting standards, B, B, made of metal or other suitable material. These bolts pass through short longitudinal slots in the standards, whereby the latter may be adjusted to stretch the cloth when desired. These standards are grooved, or have ribs on their inner sides by which the ends of the end bars, C, C, are held. The end bars connect the side bars and their standards with each other. Each end bar is made of two pieces or bars, *b* and *c*, both of equal and full length. Between them are held the ends of the fabric constituting the bed bottom, and clamped by means of screws or bolts, *d*,*d*. The end bars are held in inclined positions, as shown in figure 1, by the ribs or grooves on the standards, and are held in place by means of screws, *e*, which are fitted through the standards, or by other equivalent devices. By being in the inclined

position the end bars are arranged to hold the fabric secure, without coming in contact with its under side more than is necessary."

The claims in the re-issued patent are:

"(1) The combination of the side bars and end bars and elastic coiled wire fabric, D, attached only to the end bars, with the end bars of the frame elevated above the side bars, so that the fabric will be suspended above the side bars from end to end of the frame. (2) The combination in a removable bed bottom, or bedstead frame, of the side bars, A, standards or corner pieces, B, end bars, C, and the elastic fabric, D, combined and arranged substantially as and for the purposes specified. (3) The inclined double end bars, C, of a bedstead frame, arranged substantially as and for the purpose herein shown and described. (4) The standards, B, constructed as described, arranged longitudinally, adjustable on the side bars of a bedstead frame, to permit the inclined end bars to be set a suitable distance apart, as set forth."

The first and second of these claims are new in the re-issued patent. The third and fourth are the claims in the original patent, and are repeated in the re-issue. This re-issued patent has been sustained as against all prior devices in *Whittlesey vs. Ames*, 9 Bissell, 225, and I concur in the views expressed by Judge Blodgett in that case, touching the validity of the patent. The only question necessary to consider here is that of infringement. The defendants' device consists of the coiled wire fabric, side rails, double end rails, and certain kinds of corner irons which exhibit the element of adjustability. The end bars rest directly upon the side bars; that is, the inner edge of each end bar rests upon, and is in direct contact with, the side bars. One end bar is held in place by ordinary bolts which pass through it and the side bars. The other end bar is united with the side bars by what may be called angle irons and bolts. These angle irons are bolted to the under sides of the side bars and the end bar, and the face of the angle iron which thus rests upon and is fastened to the side bars, is longitudinally slotted, so that, in connection with screw and bolt, the iron is made adjustable. These irons do not hold the end bars elevated above the side bars; that is, they are not constructed and applied so as to

hold the end bar in a position where it is free from contact with the side bars. As before stated, the end bars rest directly upon the side bars. The outer face of the end bar is covered by a piece of metal which is fastened to it by screws and projects slightly over the side bar where the two bars are brought in contact. The only purpose of this piece of metal, so far as I can see, is to give to the outside corners greater finish. The end rails are double, as in the complainant's device; and, between the two pieces which together make the end rail, the ends of the wire fabric are clamped and held.

Now, it is said by the counsel of complainant, in their brief, that "Farnham's invention consisted of the special way in which he attached this woven-wire fabric to the frame, whereby he produced new results that had never been attained in a bed bottom before; and that special way consisted in attaching the fabric to the end of the frame so that the coils extended from end to end of the frame of the kind shown, leaving the coils entirely free, thereby having the full elasticity and spring of the coiled wires that compose the fabric." And it is contended that the gist of the invention consists in an end attachment of the fabric, leaving it unattached to the side rails, so that the strain on the fabric is lengthwise of the coils of wire, thereby utilizing the elasticity and recoil of the coiled springs; that if this result is accomplished by resting the end bars directly on the side bars, and without elevating the end bars above the side bars so that they do not come in contact, and also without making the end bars inclined, the first claim of the complainant's patent is infringed. It seems to be the view of counsel that as the third claim is a claim on the special construction of the end bars alone, and as the fourth claim is a claim for the standards arranged as therein described, it was not the intention of the inventor to limit the construction of his first claim to the use of inclined

end bars, or of any particular form of standards or corner irons. In determining what was the invention patented to complainant, the original patent to Farnham, and the specifications, drawings, and claims of the re-issue, must all be taken into consideration. And although in the first and second claims of the re-issue the end bars are not described as inclined double end bars, and although in the second claim the end bars are not described as elevated above the side bars, I think the first claim must be construed to mean a combination of side bars, inclined double end bars, and elastic coiled-wire fabric attached only to the end bars, with the end bars of the frame elevated above the side bars, so that the fabric will be suspended above the side bars from end to end of the frame; and that the second claim must be held to mean the combination of the side bars, A, standards or corner pieces, B, inclined double end bars, C, and the elastic fabric, D, combined and arranged as and for the purposes specified.

In view of the state of the art the patent must be limited to the construction described. This was the view taken by Judge Blodgett in *Whittlesey vs. Ames, supra.* He says:

"The steamboat bunk-bottom, shown in the testimony of Robert E. Campbell, and the Dreusike and Dye patents, must be considered as operating to limit the claim of this patent to the special devices shown. The Campbell bunk-bottom was made of canvas, stretched from end rail to end rail, without outside fastenings; and although canvas may not come within the definition of an 'elastic sheet,' there can be no doubt that it is a 'flexible sheet.' The Dreusike bed was made of coiled-wire fabric, and while provision was made for the side fastenings, I think there can be no doubt he intended that the strain of supporting the weight to be borne by the bed was to come upon the end fastenings. In the light of this evidence I think that while these first two claims in the re-

issued patent may be sustained for the combination of the side rails, standards, end rails, and elastic coiled-wire fabric, yet it must be limited to the peculiar kind of side rails, standards, and end rails shown, or their manifest equivalents. Side rails, end rails, and elastic coiled-wire fabric were old, but the inclined end rail, made in two parts for the purpose of clamping the fabric and holding it suspended by means of the inclination between the points of attachment, seems, so far as the proof of these cases shows, to have been the invention of Farnham. So, too, his 'standards,' or corner pieces, B, are not shown to have been anticipated by any prior user or inventor. I think, therefore, that the owner of the Farnham patent had the right to claim by the re-issue the combination of the elastic coiled-wire fabric with these parts, whether they were new or old; but he had not the right to claim broadly, for Farnham, the sole right of suspending the fabric of which the bed bottom is made from 'end to end of the frame,' because Campbell, Dye, and Dreusike had suspended the flexible sheets of a bed bottom from end to end of the frame before Farnham made his frame."

In this construction of the complainant's patent I fully concur. As the different elements of the Farnham invention, considered separately, were old, and as flexible material, if not the coiled-wire fabric, had been previously used in bed bottoms by suspending it from end to end of the frame, it is very clear that the complainant's re-issued patent must be closely limited to the construction which it describes. Considering the nature of the invention, and the language of the specifications and claims, with the accompanying drawings, it seems to me evident that, to establish infringement, in the language of Judge Blodgett, "the peculiar kind of side rails, standards, and end rails, or their manifest equivalents," must be shown; and it might be added that the peculiar adjustment of the different parts, or the clear equivalent of such adjust-

ment, should also be shown. Both Judge Shipman and Judge Blatchford, as I understand them, concur in the construction which Judge Blodgett has put upon this patent.[1] In *Woven Wire Mattress Co. vs. Wire Web Bed Company*, Judge Shipman says: "Judge Blodgett is evidently of opinion that the end bars of the first claim must be the 'inclined double end bars' of the third claim, and that the standard of the second claim must be adjustable on the side bars, so as to permit the enclosed end bars to be set a suitable distance apart, substantially as stated in the fourth claim;" and for the reason that in the case decided, the end bars were inclined, thereby preventing the under side of the fabric from resting on the end bars, Judge Shipman held the defendant's device in that case an infringement. In *Woven Wire Mattress Company vs. Palmer*, Judge Blatchford evidently regarded the inclination of the end rails and their elevation above the side rails by means of the corner standards as material; and, as I construe his opinion, he mainly rests his judgment upon those features of the infringing device before him in finding infringement.

The bed bottom made by the defendants in the case at bar has been described. The exhibit in evidence shows a slight inclination of the end rails. But the proofs very satisfactorily establish the fact that such was not its original construction, and that in the bed bottoms which the defendants manufacture the end rails are made to rest squarely on the side rails and without any inclination of the former. The testimony that such was the construction originally of the exhibit in evidence is corroborated by the fact that the exhibited bed bottom was made in 1879, has since been moved from place to place and used as an exhibit in other litigation, and the signs of wear and tear are evident in the

[1] *Woven Wire Mattress Co. vs. Wire Web Bed Co.* 1 Federal Reporter, 222; *Woven Wire Mattress Co. vs. Palmer*, 5 Federal Reporter, 812.

fact that the different parts are considerably out of the lines of proper adjustment. This, I think, must be plain to the eye of any mechanic; and, upon the testimony and an inspection of the exhibit itself, I am of the opinion that the slight inclination of the end rails now visible is attributable to the strain of the fabric, the shrinkage of the wood, and generally to wear and tear. Since the end rails of the defendants' bed bottom are not placed above the side rails so as not to come in contact with them, but rest directly upon the side rails, it might be a close question whether there is in the defendants' device the elevation of the end rails above the side rails which is intended to be described in the complainant's patent. Certainly, the angle irons of the defendants' frame, in a material respect, do not serve the purpose of the complainant's standards, for the latter are adjusted outside the rails and hold the end rails above the side rails so that they do not touch, and so that with the inclination of the end rails the under side of the fabric cannot rest on the end rails.

Whatever might be the view taken, if the only question was whether the defendants' frame shows the elevation of the end rails above the side rails exhibited in the complainant's drawings and model, or its equivalent, or if it was whether the angle irons in defendants' frame are the equivalent of complainant's standards, I am of the opinion that in view of the limitations to be necessarily placed on the complainant's patent because of the state of the art when Farnham made his invention, the absence of inclined end bars in the defendants' bed bottom, in connection with the other differences between it and the complainant's frame just spoken of relieves the defendants from the charge of infringement. In coming to this determination, I rely upon the proofs before me that the defendants have not constructed, and do not construct, their frames with inclined end rails; and it will be understood by the parties that a different conclusion entirely

might result, if I were not satisfied from the proofs that the slight inclination now apparent in the exhibit in evidence is not attributable to original construction, but to the causes before stated.

Decree for defendants.

CHARLES EDGARTON *et al.* vs. THE FURST AND BRADLEY MANUFACTURING CO. *et al.*, AND ANOTHER CASE.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—JULY, 1881.

IN EQUITY.

1. WHITCOMB PATENT FOR HORSE HAY-RAKE—EFFECT OF DISCLAIMER ON CLAIM IN SUBSEQUENT RE-ISSUE.—In the original Whitcomb patent for improvement in horse hay-rakes, the patentee inserted the following disclaimer in his specifications:

"I do not claim the wire teeth F attached to the head E, as shown, for such device mounted on wheels is in quite common use." In the patent as re-issued, the disclaimer was omitted, and the following claim inserted: "2nd. The combination and relative arrangement of the hinged rake-head, with the supporting axle and carrying wheels * * * whereby the head is supported above the rear upper edge of the axle, as shown, and the lower ends of the teeth, when gathering the hay, occupy positions in rear of the tread of the wheels, and forward of a vertical plane on a line with the rear edge of the wheels." *Held*, that this claim in the re-issue was covered by the disclaimer in the original patent, and was therefore void.

2. INFRINGEMENT.—*Held, further*, that such claim was not infringed by a rake-head, suspended behind or in the rear of the axle by brackets, hung, so to speak, behind the axle, instead of being supported above it.

3. CLAIM VOID FOR UNCERTAINTY.—The fourth claim in the re-issued patent was for "The arrangement of the rake-head E, and foot-treadles H J and G K, or either, in relation to each other and the axle B, substantially as, and for the purposes, set forth:" *Held*, that as a combination of parts, this claim was void for uncertainty.

4. CLAIM FOR TREADLES—PRIOR USE—VOID PATENT.—The court finds from the evidence that these treadles were used and sold with Whitcomb's consent, more than two years before the patent was applied for, and hence the patent as to them is void.

5. *Brown vs. Whittemore*, and *Edgarton vs. Beck*, commented upon.

6. COMITY BETWEEN COURTS.—Where the testimony in a case involving the validity of a patent, is the same as that in a case previously decided in another district, the same construction will be given to the patent; but if a different combination of facts is presented, the case will be decided on its own merits.

Thomas H. Dodge, for complainants.

West & Bond, for defendants.

BLODGETT, J.—These two suits are for infringement of letters-patent issued on the 5th day of October, 1858, to George Whitcomb, for an improvement in horse hay-rakes. The patent was re-issued June 16th, 1868, in two parts, as re-issues No. 2,994 and 2,995; and on the 5th of October, 1872, was extended for a further term of seven years.

The first suit is brought by the owners of the original term, and the second by the owners of the extended term.

The defenses set up are:

First. The invalidity of the re-issued claims involved in this suit.

Second. That the devices covered by the re-issued patent were in public use with the knowledge or consent of the patentee, for more than two years prior to his application for this patent; and also that they were publicly known and used by others for more than that time.

Third. That the improvements in question are anticipated by the older art; and

Fourth. That the defendants do not infringe.

The patent in question has reference to what are known as wire tooth horse hay-rakes, and the claims of the patent alleged to be infringed by the defendants, are the second and fourth of re-issue No. 2,994, which are as follows:

"2nd. The combination and relative arrangement of the hinged rake-head with the supporting axle, and carrying wheels, substantially as shown and described, whereby the head is supported above the rear upper edge of the axle, as shown, and the lower ends of the teeth, when gathering the hay, occupy positions in rear of the tread of the wheels, and forward of a vertical plane on a line with the rear edge of the wheels, substantially as shown in the accompanying drawings.

"4th. The arrangement of the rake-head E and foot treadles H J and G K, or either, in relation to each other and the axle B, substantially as, and for the purposes, set forth."

In his specifications, forming part of the original patent, the patentee inserted a disclaimer, as follows:

"I do not claim the wire teeth F attached to the head E, as shown, for such device, mounted on wheels, is in quite common use."

This disclaimer is wholly omitted from the re-issued patent. The only claim in the original patent was:

"The arrangement of the treadle J K, lever I, rake-head E, arms G K, bar F, joint C, and adjustable rope L, substantially as, and for the purposes set forth."

The patent was before the United States Circuit Court of Massachusetts, in June, 1872, in the case of *Brown vs. Whittemore, et al.*, 5 Fisher, 524, Mr. Justice Clifford and Judge Lowell, presiding, and the two claims now in question were sustained under the facts in that case, and it was again before the same court, Judge Lowell presiding, in December, 1879, in the case of *Edgarton et al. vs. Beck et al.*, and the fourth claim sustained under the facts in that case.

In the first of these cases the court said:

"The record does not contain a copy of the original patent, and there is no evidence of what changes, if any, are found in the re-issue. In the absence of such evidence, we must, of course, assume that the action of the Patent Office was well warranted by the facts, and that the re-issued

patent is open to only such objections as might have been raised to the original patent."

In *Brown vs. Whittemore*, the second point made in this case seems to have been urged, and the court said:

"Upon a very careful examination of the evidence, we are of opinion that the combinations of the second and fourth claims were not only invented by Whitcomb, but that they had not been publicly used or sold with his consent before the time in question. * * * And though the evidence is not all on one side, yet the preponderence of it is that the combination of the treadle for raising the rake-head with the other devices was not fully discovered and used before June, 1856."

In *Edgarton et al. vs. Beck*, the contest seems to have been mainly over the question of novelty and infringement.

But the proofs in *Brown vs. Whittemore*, on the question of prior use and sale with the consent of the patentee, and in *Edgarton vs. Beck*, on the question of novelty, do not seem to have been the same as in the cases now before the court; and the original patent is before this court, which was not before the court in the Whittemore case.

Of course, if the testimony in these cases was substantially the same as that in the cases heretofore decided by the learned judges in the Circuit Court in Massachusetts, I should feel wholly bound by their decisions, and the construction of the patent given by them. But as it is evident from the inspection of this record that I have a different combination of facts to deal with from what has been heretofore presented, I must consider these cases in the light of their own evidence.

The first objection to the second claim is that it comes within the disclaimer of the original patent.

"I do not claim the wire teeth F attached to the head E, as shown, for such a device mounted on wheels is in quite common use."

What is it that Whitcomb here disclaims? My own construction is that it is the rake-head E mounted on wheels, as described in his specifications and shown in his drawing, and this rake-head and mode of mounting it is described in his original specifications, in the following language:

"The back end of the shafts or thills C C extend a trifle back of the axle B, and to the back end of the thills beyond the back part of the axle, a rake-head E is connected by joints or hinges C, the hinges being at the under side of the rake-head, as shown clearly in figure 1, so that the head may work thereon as a fulcrum."

Figure 1, in the drawing of the original patent, and in the re-issued patent, shows the rake-head made of a square stick of timber with an eye-bolt passing through from corner to corner, which, with an eye-bolt or staple passing through the end of the thill makes the joint or hinge by which the rake-head is attached to the carriage. By this arrangement the teeth hang nearly in a line with the periphery of the wheel, the points coming to the ground just back of the tread of the wheel.

Naturally enough the curved rake teeth will hang or move somewhat in the line of the periphery of the wheel, and they will hang just back of the tread of the wheel.

If I am right in my construction of this disclaimer, there can be no doubt that the second claim of the re-issue is for the very thing which Whitcomb disclaimed and said was in common use in his original specification. He brings this case clearly within the principle laid down by the Supreme Court of the United States in *Leggett vs. Avery*, 101 United States p. 259:

"We think it was a manifest error of the commissioner in the re-issue to allow the patentee a claim for an invention different from that which was described in the surrendered letters, and which he had thus expressly disclaimed. The pretense that an error had arisen by inadvertence, accident or mistake, within the meaning of the patent law, was too bald for consideration. The very question of the validity of these claims had just been considered and decided with the acquiescence and the express disclaimer of the patentee. If, in any case, where an applicant for letters-patent, in order to obtain the issue thereof, disclaims a particular invention or acquiesces in the rejection of a claim thereto, a re-issue containing such claim is valid (which we greatly doubt), it certainly cannot be sustained in this case."

Then, again they say, on the same page:

"As before remarked, we consider it extremely doubtful whether

re-issued letters can be sustained in any case where they contain claims that have once been formally disclaimed by the patentee, or rejected with his acquiescence, and he has consented to such rejection in order to obtain his letters-patent. Under such circumstances, the rejection of the claim can in no just sense be regarded as a matter of inadvertence or mistake. Even though it was such, the applicant should seem to be estopped from setting it up as an application for a re-issue."

So, too, in the bottle stopper case, lately before Judge Shipman, *Putnam vs. Tinkham*, 4 Federal Reporter, 411, the learned judge says:

"The claim is as follows: 'The internally located bottle stopper B, provided with a hinged or jointed handle or bail C, composed of two elastic legs or branches, and an eye or finger loop, as and for the purposes set forth.' He virtually disclaims rigid handles, and says that his invention is designed to avoid such a method of construction. It is useless to say that by a rigid handle he merely meant a bail without spring action, for the entire paragraph shows that he also meant a handle so jointed or hinged to the stopper that it could be turned away from the mouth of the bottle. He intended to point out that his handle or bail was both hinged to the stopper and had elastic legs. The re-issue covers a device in which the bail is attached to the stopper in any manner.

"The hinged construction is briefly alluded to as one which accomplishes a certain result. * * *

"In the original patent the patentee informed the public, with precision, and after deliberation, that his invention was an improvement upon a rigid handle, and limited himself to a hinged or jointed handle.

"It has now become important for the plaintiff to possess himself of the territory which his assignor attempted to occupy, but abandoned, and the ownership of which he virtually disclaimed.

"A comparison of the two patents shows that the case is clearly within the principles which have been recently and frequently announced by the Supreme Court as applicable to re-issues. The re-issue is void because it is on its face for a different invention from that which was embraced in the original patent: *Russell vs. Dodge*, 93 U. S. 460; *Railway Co. vs. Sayles*, 97 U. S. 554; *Powder Co. vs. Powder Works*, 98 U. S. 126; *Leggett vs. Avery*, 17 O. G. 445."

These authorities seem to fully meet this case, and I can put no other construction upon them than that this claim is void by reason of the original disclaimer. This patentee had no right, after having stated positively to the world and to the patent office that he did not claim the idea of mounting

the rake-head upon the top of the carriage, by a re-issue, to claim this as an element of invention by himself.

But if there is room for doubt as to the soundness of this position, I am also clear that the defendant does not infringe this claim. The claim is for the combination, etc., whereby the head is supported above the rear upper edge of the axle, as shown.

The defendant's rake-head is suspended behind or in the rear of the axle by brackets, hung, so to speak, behind the axle instead of being supported above the axle.

In *Edgarton vs. Beck*, Judge Lowell says:

"The difficulty with the second claim of the re-issue, as applied to this case is that the patentee has seen fit, for some reason, to describe his rake-head as supported above the upper edge of the axle, and the defendant's rake-head is on a line with the axle. It may be that this limitation was unnecessary, but it is found in the second claim, and I do not feel at liberty to disregard it."

The inspection of the two models before me shows that the distinction taken by Judge Lowell was mechanically and technically correct. The specification and drawing described the particular manner and place, where and how the patentee, Whitcomb, supported his rake head upon the carriage.

Judge Lowell sees fit to confine him to that special method of so supporting his rake-head.

The defendant does not literally support his rake-head upon the axle at all, but by means of the brackets he suspends or hangs it in the rear of the axle, so that a different function or mode of operation is accomplished by defendant's rake-head from what is accomplished by the Whitcomb rake-head. The Whitcomb rake-head, having for its point of motion the place of attachment to the thills by its hinge, necessarily made it more difficult to keep the teeth upon or near the ground while gathering the load, while by the peculiar manner in which defendant's rake-head is suspended, its whole weight aids in holding it down in working position.

Probably the testimony before Judge Lowell in this case, showed that Whitcomb must from the state of the art be confined to the specific device, that is, the special place where, and mode by which, he supported his rake-head on the carrying wheels, because the proof in this case shows that Randall Pratt had mounted his rake-head over or on the axle, long before Whitcomb entered the field; and that Whitcomb himself and Banks and Craft, had, as early as 1853, 1854 and 1855, made rake-heads with the heads mounted on or over the axle and behind the axle.

Randall Pratt, in his patent granted in 1856, says:

"Over the main axle, and secured to it by studs or posts is a rod or axle, marked c c, extending the whole length between the wheels, to which the teeth of the rake are attached, by any form of movable joint, so that each may move up and down independent of the rest. This rod also forms the center of motion of the apparatus for raising and depressing the teeth, to be hereafter described."

An inspection of Pratt's patent shows his rake-head supported over the axle in substantially the same way; not of course attached by just the same kind of joint or hinge, but mounted over the axle so that the teeth fall outward and backwards almost in the line of the wheels, and come to the ground just back of the tread of the wheels. That is, there may be, in the practical full sized rakes, a few inches difference, but not enough to make a distinction or difference in the principle or mode of operation of the two devices in that regard.

The same principle and mode of operation, but differently worked out, are found in Delano's Patent of 1849; Martz's Patent of February, 1856, and in Grant's English Patent of 1847.

As to the fourth claim it is urged by the defendants that this claim is void for uncertainty, because it does not describe an operative mechanism. It is for the

"Arrangement of the rake-head E and foot treadles H J and G K, or

either, in relation to each other and the axle B, substantially as and for the purposes set forth."

This claim does not connect the treadles with the rake-head nor the axle, nor show how these treadles are operative parts of the machine.

The description of these in the re-issued patent is as follows:

"To the upper end of bar or arm F are hinged or pivoted the rear ends of the arms G and H. The front end of arm G is pivoted or hinged to the hand lever I, which in this instance is slotted out to receive the lever G, as shown at *d*, while its lower end is hinged or pivoted to the front ends of the braces a a, as shown at *e*. The lower end of arm H is hinged or pivoted to the rear and lower end of the foot treadle J, the front end of which treadle J being hinged or pivoted to the angle braces a a, as shown at *f*.

"Another foot treadle K is hinged or pivoted to the angle braces a a, as shown at *g*, and the rear inner part of the foot-treadle K is connected to the front part or end of arm G by a link or rod *h*."

Here is a description of two separate treadles operating independently of each other. Their functions are different, and no part of one forms any part of another. The words, "or either" would seem to indicate that it was the purpose of this patentee to claim that if any person used both or one of these treadles, he thereby infringed upon this claim; that is, if a rake is made with the treadle H J, for the purpose of unloading the rake, and an entirely different device from the treadle G K for holding the rake teeth down while gathering the hay, this claim is thereby infringed. That is to say, the true construction of this claim as contended for by complainants is that the words "or either" covers the use of either of these treadles for the purpose of performing the function they respectively fulfill in complainants' rake.

If this is the construction of this claim, then the words, "in relation to each other," must be disregarded, as these are words which show combination or a joint or common function in the parts described. I think that you must reject

the words "in relation to each other," as applicable to these treadles, or else the two treadles are to be treated as independent organisms, each one of which is covered by this claim.

It seems to me that as a combination of parts, this claim must be held void for uncertainty, as I have already said, because it does not show whether the patentee intended to cover by this claim the two treadles working in combination with each other for their different purposes, or whether he intended to cover each one as a separate device, so as to be able to punish any infringer who used both, or only one. In other words, it seems to me he attempts here to cover not only the combination of these treadles with the axle, but each separate element of his combination. And this, I think, cannot be allowed.

But even if I am wrong in this construction, still it seems to me that this claim must be held inoperative, because it shows no useful result which can be produced by this mechanism alone. He does not show that these treadles are to operate in combination with the bar or standard F, so as to work the rake-head either to unload or hold it down while gathering the hay.

As claimed, these treadles are simply two sticks, as was said upon the argument, which are not connected with any part of the mechanism. It is true that the words "as shown" refer us to the specifications and drawings of the patent, but when we examine these specifications and drawings we find that these treadles do not reach any operative combination or connection with the axle, except through the rake-head, and it is so obvious that it needs no argument, that the treadles and axle alone would not rake hay or perform any other effective work. So that a claim of the treadles and axle gives us no operative mechanism.

But without being hypercritical as to the language of this, or either of these claims, I find from the proof that both these

treadles were used and sold with Whitcomb's consent, more than two years before the patent was applied for.

These treadles are both shown in the three full-sized rakes in evidence in this case. These rakes were, I am satisfied, made and sold as early as 1855.

The only substantial difference between these rakes and the patent is the mode of hinging the rake-head to the axle or carriage.

In the full sized rakes shown in evidence, the rake-head is fastened to the carriage by clasps, which allow the rake-head to revolve within the clasps, upon its own axis.

This rake-head is attached to the carriage frame by the joint *C*, so that the lower corner of the rake-head is made the center of motion, a difference which may have some mechanical value, but is only a specific difference.

These treadles which I am now considering were in use in the old rakes in 1854 and 1855. This evidence shows that Whitcomb began to make rakes as early, or earlier than 1851. In 1852 he applied for a patent on the form of rake which he then claimed to have invented, which application was rejected. In this application he shows a horse-rake with wire teeth, and the teeth attached directly to the axle of the carriage and operated by a mechanism something like a reach, as it was called, or the bar H and the lever I.

In 1853, he adopted a separate rake-head, which, of course, he or some one mounted on or attached to the carriage. This separate rake-head in order to be operative or of any use to the mechanism must be, in some way, attached to the carriage; some mode of unloading was also necessary to the operation of this machine, and as all these rakes were intended to allow the driver to ride, some kind of treadle or lever, operated by the feet as well as the hands, was almost a necessity and was indispensable to the practical operation of this rake by one man.

The whole organism shows that it was intended that the

driver should ride upon the carriage and that he should operate the rake from his position on the driver's seat.

There must therefore have been embodied in the mechanism in some form, levers and treadles which would enable the driver to operate the rake, to hold the teeth down while gathering the hay and raise the rake-head when loaded.

I therefore come to the conclusion that treadles and levers were early adopted in the progress of the development of this rake, and that substantially the treadles which are shown in the Whitcomb patent, were in use much more than two years prior to the application for this patent.

The testimony on the part of the defendant shows clearly, as evidenced by the recollection of witnesses, that such treadles were used; but from the very nature of the invention, and its progress step by step, it seems to me that one of the most natural devices that the mind of the constructor would be directed to in making a practical riding hay rake, would be the method of operating the rake from the driver's seat, and they could hardly have attempted to make a device for that purpose, without the adoption of treadles.

This view seems also to be so fully in harmony with the recollections of the witnesses who have testified as to the development of the finally perfected rake, that I consider it confirmatory of the testimony of those witnesses.

Whitcomb first began to make rakes at Glenville, Connecticut. He moved to Brundage's Corners, which were only a couple of miles from Glenville, in 1853, and there had his factory until the fall of 1855, when he moved to Port Chester; these places being all within a very few miles of each other. This locality seems to have been one in which the manufacture of this class of horse-rakes had its first inception. A number of persons besides Whitcomb were engaged in the same line of manufacture. It is true that they may have followed Whitcomb. He may have been the inventor of the

rake-head E, as shown in his patent, and he may have been the first person to support it upon a carriage. He may have been the inventor of the treadles in question.

The only question is, did he apply for a patent before these parts of his rake became common property, and my conclusion from the proof is, that Whitcomb did not make his application for a patent until more than two years after this rake-head and these treadles had come into public use, with his consent. The full sized rakes that are put in evidence in this case show satisfactorily that these devices, these treadles and levers, were adopted and in use, and were part of these original rakes at the time they were made and put upon the market, and that they were actually made and sold as early as the haying season of 1854.

This certainly fully sustains the conclusion to which I have arrived as to the use of these treadles in those rakes. It is claimed on the part of the complainant that the old rakes have been altered over; that new treadles have been put into them, but there is nothing in the appearance of the mechanisms or of the treadles as they stand now before the court, to show that there has been any change. All these parts seem to be of an age—they all bear the same marks of exposure. There is no evidence of any cutting, or change by substituting the treadles they now have for other devices. Indeed, the whole appearance of these old rakes satisfies me that they now show their parts as they were originally constructed.

I have therefore come finally to the conclusion that these treadles were old and common property at the time this patent was issued.

Perhaps, as I have already said, they were Mr. Whitcomb's invention. He seems to have been the leading genius in that locality in reference to this class of farming implements, and it is likely and probable that these improvements were his—but he abandoned them to the public. He allowed his neigh-

bors to use them. They were public property and sold on the market long before the beginning of two years prior to the application for this patent, and they were not mere experimental uses. These rakes were made and sold in the market for use in the fields, not merely for the purpose of seeing whether they would work or not.

So that from all these considerations I come to the conclusion that the claims of this patent involved in this suit must be held void.

The bill is dismissed for want of equity.

NOTE.—RE-ISSUE PATENTS.—Previous to the Patent Act of 1836, which established a board of competent examiners, and introduced a more thorough system for the careful examination of applications for patents, patents had very frequently been adjudged invalid on account of the insufficiency of the specifications—the law requiring a complete and accurate description of the device in the specifications—usually because by inadvertency, accident or mistake, the patentee had not sufficiently separated the old from the new, and had thus claimed more than he was entitled to, or else on account of the inadvertent inaccuracy of the description. This statute intended to remedy this evil by permitting the patentee to surrender his defective patent and have it renewed in proper form when it shall be inoperative or invalid by reason of a defective or insufficient description or specification, or by reason of claiming more than entitled to. *Burr vs. Duryee*, 1 Wallace, 531; *Miller vs. Brass Co.*, 104 United States, 355. A re-issue then can only be had when the original patent is inoperative or invalid either because of a defective or insufficient specification, or by reason of the patentee claiming as his own invention, more than he had a right to claim as new; and even then only when the error has arisen from inadvertence, accident or mistake, and without any fraudulent or deceptive intent. *Giant Powder Co. vs. California Vigorit Powder Co.*, 6 Sawyer, 508. And if the original clearly and fully, without ambiguity or obscurity, describes and claims a specific invention, complete in itself so that it cannot be said to be inoperative or invalid by reason of a defective specification, a re-issue cannot be had for the purpose of expanding and generalizing the claim so as to cover an invention not described and specified in the original. *James vs. Campbell*, 104 United States, 370. For if it appears upon comparison that the re-issue only differs from the original in claiming an invention of broader scope, it is manifest that the original patent must have been valid, if the re-issue is, and if the original was valid to the extent of its

claim, there is no authority for a re-issue. *Giant Powder Co. vs. California Vigorit Powder Co.*, 6 Sawyer, 508.

The re-issue can only be granted for the same invention embraced by the original: *Battin vs. Taggert*, 17 Howard, 74; *Seymour vs. Osborne*, 11 Wallace, 516; *Russell vs. Dodge*, 93 United States, 463; and the claim in the re-issue should not be broader than in the original: *Johnson vs. Railroad Co.*, 105 United States, 547; *Burr vs. Duryee*, 1 Wallace, 581; *Carlton vs. Bokee*, 17 Wallace, 463; *Powder Co. vs. Powder Works*, 98 United States, 126; *Manufacturing Co. vs. Corbin*, 103 United States, 786; nor can any new matter be introduced into the re-issue: *Gill vs. Wells*, 22 Wallace, 15; *Collar Co. vs. VanDusen*, 23 Wallace, 530.

The statute was not intended to allow a patent to be enlarged, after experimental use of it, so as to cover inventions subsequently made, by the addition of new matter, or the omission of important particulars in the original and the generalization of claims in the re-issue: *Russell vs. Dodge*, 93 United States, 463; *Manufacturing Co. vs. Ladd*, 102 Id. 411; but merely to allow the correction of mistakes inadvertently committed or the restriction of claims made too broad: *Manufacturing Co. vs. Ladd, supra*; the prime object of re-issues being to enable the patentee to make the description of his invention more clear, plain and specific, so as to comply with the requirements of the law: *Miller vs. Brass Co.*, 104 United States, 355.

A defective specification can be rendered more definite so as to embrace the claim made, or the claim can be so modified as to correspond with the original specification, but except under special circumstances, this is the extent to which the operation of the original can be changed by re-issue: *Russell vs. Dodge*, 93 United States, 463. In a clear case of a real *bona fide* mistake inadvertently committed the claim in the re-issue may be enlarged: *Manufacturing Co. vs. Ladd* 102, Id. 411; *Miller vs. Brass Co.*, 104 Id. 355. Thus if the patentee accepts a narrow claim instead of the broad claim which he has applied for, being led into the error of supposing that he is entitled to only the narrow claim, by the Commissioner himself, if the narrow claim as allowed practically invalidates the patent or nearly so, on a discovery of the error, the Commissioner may grant a re-issue to cover the broad claim: *Morey vs. Lockwood*, 8 Wallace, 230; though a mere error of judgment cannot be corrected by enlarging the claim in the re-issue: *Manufacturing Co. vs. Ladd, supra*; *Miller vs. Brass Co., supra*; but an application for a re-issue containing an enlarged claim, must in any case be made in apt time, and long delay will be construed as a dedication to the public of all which is not contained in the claim of the original: *Combined Patents Can Co. vs. Lloyd*, 21 Official Gazette, 713; *Miller vs. Brass Co. supra; Johnson vs. Railroad Co.*, 105 United States, 589; *Bants vs. Frantz*, Id. 165; *Mathews vs. Machine Co.*, Id. 54.

But if the claims in the reissue are narrower than those of the original, and the parts which go to make the combination claimed in the re-issue were described in the apparatus of the original and exhibited in the model therewith, the re-issue is valid, and a delay of over ten years in the application for it does not avoid it. *Cochrane vs. Deener*, 94 United States, 780, 790; and the strict rule of *laches* does not apply to re-issues made for the purpose of correcting patents which are inoperative and invalid for want of a full and clear description of the invention: *Miller vs. Brass Co.*, 104 Id. 352.

The statute authorizes the insertion of new claims in the re-issue, founded upon the specification and drawings of the original when the omission results from inadvertence, accident or mistake: *Combined Patents Can Co. vs. Lloyd*, 21 Official Gazette, 713; *Wilson vs. Coon*, 19 Id. 482; *Waring vs. Johnson*, 19 Id. 1068; though under the more recent decisions it is doubtful if a re-issue can be sustained in any case if it contains claims which have been once formally disclaimed by the patentee, or rejected with his acquiescence, in order to obtain the patent. *Leggett vs. Avery*, 101 United States, 256; *Ex parte Pfander*, 22 Official Gazette, page 1881, (Decision by Commissioner); and if it is apparent that no such inadvertence, accident or mistake could have occurred an expansion of the claim cannot be allowed. *James vs. Campbell, supra; Heald vs. Rice*, 104 United States, 737.

The patentee can in the re-issue modify or divide his claims, so as to embrace severally in different re-issues, the distinct features of his invention claimed in combination in the original: *Corn Planter Patent*, 23 Wallace, 181; *Smith vs. Merriam*, 19 Official Gazette, 601; *Dederick vs. Cassell*, 20 Id. 1233; but if in his original specification he claims as his invention a particular part of a machine, and his claims are all limited to that part, a re-issue embracing other and distinct portions of the machine, is *pro tanto* void; *Kells vs. McKenzie*, 20 Official Gazette, 1663. The claims in a re-issue, however, are to be construed if the language will reasonably bear such an interpretation, so as not to embrace any invention broader in its scope than that in the original. *Brainard vs. Cramme*, 22 Official Gazette, 769.

When the patentee surrenders his patent for re-issue his rights under the original are entirely extinguished. *Moffit vs. Garr*, 1 Black, 273; *Peck vs. Collins*, 103 United States, 660.

The granting of the re-issue patent by the Commissioner is a conclusive decision that the original patent was inoperative or invalid by reason of defective or insufficient specifications, or by reason of the patentee having claimed as his own invention or discovery more than he had a right to claim as new, and that these errors have arisen by inadvertence, accident or mistake, and without any fraudulent intent: *Selden vs. Stockwell Self-Lighting Gas Burner Co.*, 19 Blatchford, 544; *Giant*

Powder Co. vs. California Vigorit Powder Co., 6 Sawyer, 508; *Smith vs. Merriam*, 19 Official Gazette, 601; *Corn Planter Patent*, 23 Wallace, 217; *Ball vs. Langles*, 102 United States, 128; *Railroad Co. vs. Stimpson*, 14 Peters, 458; *Stimpson vs. Railroad Co.*, 4 Howard, 404. But this does not preclude the examination by the court of the original and re-issued patents, to see whether or not they disclose on their face, a case in which the Commissioner has jurisdiction to act, or a case in which by his determination he has exceeded his jurisdiction; and the courts must decide upon an inspection of the two instruments whether the re-issue is for the same invention as the original: *Giant Powder Co. vs. California Vigorit Powder Co., supra*; *Ball vs. Langles, supra*; *Flower vs. Rayner*, 19 Official Gazette, 425; *Russell vs. Dodge*, 93 United States, 460; *Seymour vs. Osborne*, 11 Wallace, 544; *Wicks vs. Stevens*, 2 Woods, 312; *Rubber Co. vs. Goodyear*, 9 Wallace, 796; *Stimpson vs. Railroad Co., supra*; *Garneau vs. Dozier*, 102 United States, 231. And if the original is not put in evidence there is nothing by which the court can determine that the re-issue was unauthorized. *Searles vs. Bonton*, 21 Official Gazette, 1784.—[Reporter.

PRESERVED SMITH vs. CITY OF FOND DU LAC.

Circuit Court—Eastern District of Wisconsin.—July, 1881.

1. Constitutional Law—Municipal Taxation—Validity of Bonds.—A Wisconsin statute authorized certain cities and towns to subscribe to the capital stock of a railroad company, but contained no restriction as to the amount of the subscription. It was provided, however, that the terms, conditions, and amount of such subscription should be previously set forth in a written proposition of the company, which should be submitted to the people, and approved by popular vote at an election duly called: *Held*, that such statute did not conflict with Section 3, Article 11, of the State Constitution, which declares it to be the duty of the Legislature to provide for the organization of cities and villages, "and to restrict their power of taxation," etc.

2. When Federal Court will not Declare State Law Unconstitutional.—A Federal Court, in determining the rights of the parties under a state law, will not, in a doubtful case, declare such law to be in conflict with the State Constitution, unless sustained in so doing by a distinct adjudication of the Supreme Court of such state.

3. *Foster vs. Kenosha*, 12 Wisconsin, 618, and *Fisk vs. Kenosha*, 26 Wisconsin, 23, examined and distinguished.

This was an action by the holders of coupons, attached to certain bonds issued by the City of Fond du Lac, in payment of a subscription made, in its behalf, to the capital stock of a railroad company, originally known as the Milwaukee and Northwestern Railway Company, but whose name was subsequently changed to that of the Northwestern Union Railway Company.

Each Bond, dated November 7, 1881, is made payable to the Northwestern Union Railway Company, or bearer, and recites that it

"Is one of a series of 750 bonds, bearing even date herewith, each for the sum of $100, * * and is issued in pursuance of an election held in said city on the 7th day of November, 1871, under and by virtue of a certain act of the Legislature of the State of Wisconsin, approved March 21, 1871, entitled 'An act to authorize certain towns, cities and villages therein named to aid the Milwaukee & Northwestern Railway Company;' by which said act certain towns, cities and villages were enabled to subscribe for and take stock of the said Milwaukee & Northwestern Railway Company, at which election a majority of the legal voters of said city voted 'For the Railway Proposition,' requiring the said city to subscribe for and take the common stock of the said Milwaukee & Northwestern Railway Company, in the sum of $75.000, and to issue the bonds of the said city therefor; and the said election having been duly ordered, noticed, and held by the proper authorities, and then and there declared duly carried 'For the Railway Proposition,' by said proper authorities, a proposition in writing having been previously made and submitted by said company to the proper authorities of the City of Fond du Lac, as required by said act for such an election, the same having been ordered and held, and notice of the time and place of holding the same having been given in all respects as required by law and the act aforesaid, the name of the said Milwaukee & Northwestern Railway Company was changed to that of the Northwestern Union Railway Company, by unanimous vote of the stockholders at a regular meeting thereof, held at the

City of Fond du Lac on the 3d day of May, 1872, in pursuance of the statute in such a case made and provided."

The bonds were signed by the mayor and clerk, and attested by the corporate seal of the city.

The bonds were executed by the city about July 13th, 1872, and delivered to the Northwestern Union Railway Company in 1873, the city receiving stock in exchange therefor. They were sold in open market, the plaintiff subsequently becoming purchaser of those in suit, in good faith and for value. The city, by order of its council, regularly paid the interest coupons until November, 1880, when it refused to make further payment.

Edwin H. Abbot, and *Winfield Smith*, for plaintiff.

W. D. Conklin and *E. S. Bragg*, for defendant.

HARLAN, J., (orally, after stating the facts.)—The recitals in the bonds import a compliance with the provisions of the statute under the authority of which they were issued. The fact that no such corporation as the Northwestern Union Railway Company was in existence at the date of the bonds is wholly immaterial, since it satisfactorily appears that they were in fact issued after that corporation was created, and by virtue of the statute of 1871, authorizing the City of Fond du Lac, and other designated municipal corporations, to subscribe stock in the Milwaukee and Northwestern Railway Company, and to execute bonds in payment thereof. The city is estopped by the recitals in the bonds, to say that the change by the original company, of its corporate name, to that of the Northwestern Union Railway Company, was not in pursuance of the statute governing such cases.

Plainly, therefore, the only question among those discussed by learned counsel for the city that need be considered, is whether the act of March 24, 1871, is in conflict with the

Constitution of Wisconsin. If that position be sustained, the bonds must be declared void, by whomsoever held, and without reference to the good or bad faith of those who now own them. With the decisions of the Supreme Court of the United States upon this point, counsel, I observe, are entirely familiar; and it is therefore unnecessary to make special reference to them.

The first section of the act of 1871, declares that it shall be lawful for the city of Fond du Lac, and certain named towns and villages, to subscribe to the capital stock of the Milwaukee and Northwestern Railway Company, and, in payment thereof, "to make, issue and deliver to said company its bonds, payable to such person or persons, trustees or corporation, or to said company or bearer, at such time, for such sum or sums, with such rate of interest not exceeding 10 per cent., transferable by general or special indorsement or by delivery, and in such form and manner, and upon such terms and conditions, as may be agreed upon by and between the directors of said railroad company, and the proper officers of such town, incorporated city or village, as the case may be; * * But no such subscription for the stock or bonds of said company, and no such bonds or orders shall be issued or delivered to said company or money paid thereto by or for any such town, city or village, unless a majority of the legal voters of such town, city or village, as the case may be, voting on the question, shall *first* have voted in favor of such subscription in the manner hereafter provided; but when such subscription shall have been made, the same shall be absolutely binding upon the town, city or village, by or in whose behalf, such subscription shall be made."

The succeeding sections of the act made provision for a written proposition from the railroad company to the town, city or village, from which it desired a subscription. That proposition, the statute required, should state the amount,

kind, and description of stock or bonds desired to be subscribed, the terms of the proposed subscription, and the mode in which its payment was desired to be made; and, if in bonds, then the company's proposition should state the amount of each bond, the aggregate of all such bonds, the rate of interest they were to bear, not exceeding ten per cent. and the date of maturity. The statute, also, provided that the substance of this written proposition should be submitted to the legal voters of the municipality, at an election, called by the proper local authorities after notice of not less than twenty nor more than thirty days.

The statute, it will be also observed, imposes no limit upon the amount which might be subscribed by the designated municipalities, except that the proper officers making the subscription, and issuing the bonds, were restricted to the amount named in the written proposition submitted by the company, and ratified by popular vote, that is, the city authorities were not given the power to make any subscription, except such as was called for in the proposition submitted to and approved by the people. The absence of any other restriction upon the legal voters, as to the amount to be subscribed, brings the statute, it is earnestly contended, in conflict with the third section of article 11, of the State Constitution, as interpreted by the Supreme Court of Wisconsin.

That section provides: "It shall be the duty of the Legislature, and they are hereby empowered to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, *so as* to prevent abuses in assessments and taxation, and in contracting debts by such municipal corporations."

In support of the proposition that the act of 1871 is repugnant to the Constitutional provision, and, therefore, void, we are referred to *Foster vs. City of Kenosha*, 12 Wisconsin,

618, decided in the year 1860, and to *Fisk vs. City of Kenosha*, 26 Wisconsin, 23, decided in 1870.

In the first of those cases, the question was as to the constitutionality of a certain portion of the charter under which the city of Kenosha had made a subscription to the stock of a railroad company. The charter (Sec. 8,) contained these somewhat unusual provisions:

"The city council shall have power to levy and collect special taxes for *any purpose* (aside from what may be specially provided for in the charter), *which may be considered essential to promote or secure the common interest of the city*, or may borrow on the corporate credit of the city, for such purposes, any sum of money for any term of time, at any rate of interest, not exceeding ten per centum, and payable at any place that may be deemed expedient. Bonds or scrip may be issued therefor, under the seal of the corporation, and the resources and credit of the city are pledged for the re-payment of the sums so borrowed, with the interest on the same. All such moneys shall be expended under the direction of the city council. But no such tax shall be levied, or money borrowed, except in accordance with the provisions of section 44 of the city charter, and in all cases when questions under this section are submitted to qualified voters, the amount and object of the proposed tax or loan shall be specifically stated to be voted upon." * * * Private Laws, Wisconsin, 1853, p. 304.

The Supreme Court of Wisconsin, speaking by Mr. JUSTICE COLE, construed this provision as conferring upon the city council of Kenosha an unlimited power to contract indebtedness, including even debts wholly foreign to the purposes for which municipal corporations were, or, perhaps, could be organized. Let us see what the court said. Its language is:

"The common council have authority to contract debts to any amount, impose taxes for any and all conceivable objects and purposes; embark the finances and credit of the city in any enterprise which, in the judgment of the common council, will contribute to the wealth, prosperity or trade of the city, or promote the social and material condition of its citizens. There is no limitation, no restriction imposed by the legislature upon the power of the corporation to run in debt

or burthen the people with taxes. If the common council deem it expedient, and a majority of the voters of the city will sanction the policy, the city, in its corporate capacity, may carry on works of internal improvement, at home or abroad, so that those works are calculated to stimulate the trade and increase the business of the city. No matter how ruinous and oppressive these special taxes might be to the owners of real estate, or to the minority of the taxpayers, yet we do not see why, under this section of the charter, the common council and a majority of the qualified voters, might not compel the city to become a stockholder in a line of steamboats, to run up and down the lakes for the transportation of freight and passengers; subscribe for stock in railroads; improve harbors; open roads and build bridges, within or without the city limits; erect and operate flouring mills; keep hotels; or, in short, embark in any mercantile, manufacturing or commercial enterprise, which, in the language of the charter, 'may be considered essential to promote or secure the common interest of the city,' and pledge the resources and credit of the city for the re-payment of all sums borrowed for these purposes, and impose taxes to meet the same." "Now," said the court, further, "the question arises, can the legislature confer upon a municipal corporation such unlimited power of taxation, such unrestrained ability to contract corporate indebtedness and mortgage the real estate of the city?" Again, and after stating that the provision there under consideration conferred the power of taxation for other than municipal purposes, the court remarked:

"It is a power to impose special taxes to any amount, or for any purpose whatever, which may be considered essential to promote or secure the common interest of the city. I do not think the legislature could confer upon any municipal corporation such unlimited, such absolute power of taxation. More especially is the legislature restrained from conferring

such power under a Constitution which imposes upon it the duty, in organizing cities and villages, to restrict their power of taxation, borrowing money, and contracting debts. * * Can it confer upon a municipal corporation the right to impose taxes to any amount, and for any purpose? We think not. And, therefore, when the legislature attempts to confer upon a municipal corporation an unrestricted power to levy taxes and raise money, aside from and above what may be necessary and proper to support the local government, and for legitimate municipal purposes, such unlimited grant of power must be held to be void. Otherwise, no force or effect is given to the provision of the Constitution cited."

I have read somewhat fully from the opinion in *Foster vs. City of Kenosha*, because, upon that case, counsel for the city, mainly rely. Now it is quite clear, to my mind, that the Supreme Court of Wisconsin has not gone so far as the learned counsel for the city contends that it has. The point there decided was that the legislature could not, constitutionally, confer upon a municipal corporation authority to contract debts, without limit as to amount, as well as without any other restriction as to purposes, than the judgment of a common council, sustained by a majority of voters, that the common interest of the municipality will be thereby promoted and secured. The court held that "such unlimited power of taxation, such unrestrained ability to contract corporate indebtedness," embracing, as it did, purposes confessedly non-municipal, was inconsistent with the object and design of imposing upon the legislature the duty of restricting municipal powers "so as to prevent abuses in assessments and taxation, and in contracting debts."

That decision by no means justifies the conclusion that the legislature may not authorize a municipal subscription to the capital stock of a designated railroad company, without limit, in one sense, as to amount, but yet to be made only after and

in accordance with a formal written proposition by the company, setting forth as well the amount desired to be subscribed, as the terms of the subscription, and also after the approval of such proposition by a majority of legal votes cast at an election called and held to pass upon that specific proposition.

In the act of March 21, 1871, the purpose of the subscription therein authorized was distinctly stated, viz: to aid in the construction of a railroad in which the city of Fond du Lac had a business or commercial interest; whereas the charter of the city of Kenosha did not limit taxation and indebtedness to municipal purposes. This difference between the present case and that case is, therefore, very material. Consequently I do not feel authorized by anything involved or decided in *Foster vs. Kenosha*, to hold that the Legislature of Wisconsin, in passing the act of 1871, transcended the limits prescribed by the fundamental law of the state. Nor does the subsequent case of *Fisk vs. City of Kenosha*, *supra*, condemn the act of 1871 as unconstitutional. That case involved a construction of the same section of the charter of Kenosha as the one referred to in *Foster vs. Kenosha*, and the court does nothing more than affirm its previous ruling.

My attention has been called by counsel for the complainant to the recent case of *Bound vs. the Wisconsin Central Railroad Co.*, 45 Wisconsin 560. That was also a case of subscription by a town to the capital stock of a railroad company. The act under which the subscription was made seems to have been identical with the act of March 21, 1871, in the respects to which the comments of the counsel for the city of Fond du Lac have alluded; that is the act did not fix a limit upon the amount of subscription, otherwise than (as in the act now before us), to authorize such subscription as the voters approved when passing upon a written proposition of the company containing a statement of the amount of money or bonds desired, and terms, conditions and considerations upon

which the same would be required to be paid. The report of the case in 45 Wisconsin does not show that the constitutional question now before us was there raised, or distinctly passed upon. But it is nevertheless a fact of some significance, that the opinion in *Bound vs. Wisconsin Central R. R. Co.*, was written by the same justice who wrote the opinion in *Foster vs. Kenosha*. If the statute cited in *Bound vs. Wisconsin Central R. R. Co.*, had been deemed by him or by the learned court of which he was a member, to be obnoxious to the constitutional provision in question upon the grounds stated in the latter case, it is not probable that he or the court would have overlooked that point, whether raised by counsel or not, or would have withheld an expression of an opinion to that effect.

I do not, therefore, feel obliged, by anything in the decisions of the State Court, to adjudge that the legislature, in the act of 1871, exercised powers forbidden by the Constitution of Wisconsin. In considering this question I have not forgotten what was said by the Supreme Court of the United States, when required, in *Fletcher vs. Peck*, 6 Cranch 128, to determine whether the Legislature of Georgia had, in a particular enactment, violated the Constitution of that state. The court there said, speaking by Chief Justice Marshall, that "the question whether a law be void for its repugnancy to the Constitution is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case."

The more recent decisions of the same court justify me, I think, in saying that a Federal Court, when determining the rights of parties under a state law, will never, in a doubtful case, adjudge such law to be in conflict with the State Constitution, unless sustained in so doing by some distinct adjudication of the highest court of the state.

In this spirit were the declarations of the Supreme Court

of this state in *Attorney General vs. Eau Claire*, 37 Wisconsin, 400, when it said: "We owe great deference to the legislative authority. It is our duty to give effect to all its enactments, according to its intention, so far as we have constitutional right and power. And to that end it behooves us, as far as we are able, to place such construction on statutes as will reconcile them to the Constitution, and to give them effective operation under the Constitution, according to the intention with which they are passed. It would be a palpable violation of judicial duty and propriety, to seek in a statute a construction in conflict with the Constitution, or with the object of its enactment; or to admit such a construction when the statute is fairly susceptible of another in accord with the Constitution and the legislative intention."

Recurring again to the particular constitutional provision in question, it is clear that the framers of the Wisconsin Constitution imposed upon the legislature the duty of restricting the powers of municipal organizations in the matters of taxation, assessment, borrowing money, contracting debts and loaning their credit. The determination, however, of what were abuses, what restrictions were required in particular cases, and the exact mode in which those restrictions should be imposed, were, (and perhaps wisely) left to legislative discretion. That discretion was left untrammeled by the Constitution, except that the legislature was enjoined to restrict the powers of municipalities "so as to prevent abuses in assessments and taxation, and in contracting debts." Whether a particular restriction would prevent such abuses to the fullest extent demanded by considerations of public policy, or by the spirit of the Constitution, might often become a very embarrassing question to a judicial tribunal, except in extraordinary cases like that of *Foster vs. Kenosha*, where, in the judgment of the State Court, the disregard by the legislature of its constitutional duty, was so palpable and flagrant

as to leave the court no alternative but to say that in the particular statute there involved, the Constitution had been violated. No such state of case is here presented. If the legislature, upon looking over the whole ground, reached the conclusion that, so far as municipal subscriptions in aid of the construction of this particular road were concerned, it was a sufficient restriction to permit a popular vote only upon a written proposition by the company, stating the amount, terms and conditions of the subscription desired by it, and to authorize the local authorities to make only such subscriptions as were thus previously submitted to, and approved by the voters, I do not see upon what sound principle the judiciary could interfere, and declare that the legislative discretion had been abused. We must assume that the constitutional injunction to so restrict municipal powers as to prevent abuses in assessments, taxation, and contracting debts, was in the mind of the legislature, and that, in its judgment fairly exercised, the act of 1871, contained all the restrictions necessary, in that case, to prevent such abuses. The legislature may have been mistaken, and subsequent developments may have disclosed the want of wisdom in its action, but, in the long run, it is safer, to leave the people at the polls to remedy hasty or vicious legislation, not plainly unconstitutional, than for the judiciary to interfere, and, in so doing, usurp power which properly belongs to another department of the government.

Upon the whole case, I am of opinion that the law is for the plaintiff, and a judgment in his behalf will be entered.

The District Judge participated in the hearing of this case, and concurs in the views I have expressed. He has, heretofore, considered the same questions, and reached substantially the same conclusions in the case of *Long vs. New London.*[1] In the views there expressed by him, the Circuit

[1] 9 Bissell, 539.

Judge, it will be seen, concurred. As the questions have been argued before me with the expectation that they would be re-examined, I have deemed it proper to state fully the grounds upon which my conclusions rest.

HENRY H. GILMAN vs. S. W. WHEELOCK *et al.*

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—JULY, 1881.

1. FEDERAL JURISDICTION—COMITY BETWEEN COURTS.—The defendant, Sheriff of Rock Island County, Illinois, seized a certain horse by virtue of a writ of attachment issued out of the State Court. The plaintiff, claiming property in the horse, instituted a replevin suit in the Federal Court. The defendant pleaded property in an other person and the case was tried on its merits and issue found for plaintiff. *Held*, that it was too late after trial to deny the jurisdiction of the Federal Court, on the ground that the State Court had acquired prior jurisdiction and that the right of property must be settled there under the state statute.

2. REMOVAL OF CAUSE—ATTACHMENT SUIT.—A party who has interpleaded under the statute of Illinois in an attachment suit, can, if he is a citizen of another state, have the cause removed to the Federal Court

Ela & Parker, for plaintiff, cited 1 Kent's Commentaries, 410; Wells on Replevin, page 153 *et seq.*; *Gilman vs. Williams*, 7 Wisconsin, 329; *Ward vs. Henry*, 19 Wisconsin, 77; *Hanna vs. Steinberger*, 6 Blackford, 521; *Brown vs. Ogden*, 11 New Jersey, 370; *Heyman vs. Covel*, 44 Michigan, 332; *VanNorden vs. Morton*, 99 United States, 378.

Connelly & McNeal, *Ira O. Wilkinson*, and *Frank Baker*,

for defendants, cited *Harris vs. Dennie*, 3 Peters, 292; *Hagan vs. Lucas*, 10 Peters, 400; *Peck vs. Jenness*, 7 Howard, 612; *Taylor vs. Carryl*, 20 Howard, 583; *Freeman vs. Howe*, 24 Howard, 450; *Slocum vs. Mayberry*, 2 Wheaton, 2; *Buck vs. Colbath*, 3 Wallace, 334; *Munson vs. Harroun*, 34 Illinois, 422; *Hannebut vs. Cunningham*, 3 Bradwell, 353; *Taylor vs. Smith*, 64 Illinois, 445; *Booth vs. Ableman*, 16 Wisconsin, 460.

Blodgett, J.—This is an action of replevin for the recovery of a valuable horse, alleged to have been unjustly taken and detained from the plaintiff by the defendants. Four pleas were interposed: *First, non cepit; second, non detinet; third,* property in Robert I. Lee and not in the said plaintiff; *fourth,* that the defendant, Josiah L. Perkins, was at the time when, etc., sheriff of Rock Island county, in the state of Illinois, duly qualified and acting as such; that on the 4th day of September, 1878, the Topeka National Bank, of Topeka, Kansas, sued out of the Circuit Court of said county of Rock Island its writ of attachment of that date against one Robert I. Lee for the sum of $3,285.76, with interest from the first day of December, 1876, and caused the same to be directed to the sheriff of said county to execute, in and by which writ the sheriff was commanded to attach so much of the estate, real and personal, of the said Robert I. Lee, to be found in his county, as should be sufficient to satisfy the indebtedness mentioned in the writ, and such estate so attached in his hands to secure, so as to provide that the same might be liable for the proceedings thereon according to law, which writ was made returnable on the first Monday of January next after the date thereof; and that such writ came duly into the hands of defendant Perkins, as such sheriff, to execute, and was by him, on the day of the date thereof, duly executed by levying upon and taking into his possession the

horse in question; and that the defendant Perkins held the horse in question at the time when, etc., by virtue of the said attachment and levy.

It was further averred that the horse, at the time when the same was levied upon by virtue of the writ of attachment by defendant as aforesaid, was, and is, the property of the said Robert I. Lee, and not the property of the plaintiff; and that the said horse was properly subject to be levied upon and taken by virtue of the said writ of attachment as aforesaid. Issue was joined upon these pleas, and a trial had before a jury, in which the main question made upon the proof was as to the title of said Robert I. Lee to the horse—the defendants contending that plaintiff's alleged title was fraudulent as against the creditors of Lee, and that the plaintiff could not, under the law and facts in the case, hold such horse as against the said Topeka National Bank, a creditor of Lee.

The jury, by their verdict, found the issues for the plaintiff, and defendants now move—*First*, to dismiss the cause for want of jurisdiction after verdict and before judgment; *second*, for a new trial.

The motion to dismiss for want of jurisdiction is based upon the ground that the property in question, at the time it was taken by the marshal of this court under its replevin writ, was in the custody of the sheriff of Rock Island county, under the writ of attachment issued out of the Circuit Court of that county against the property of Robert I. Lee, and that it was therefore in the custody, under the law, of the State Court, and could not be taken from that court by the process of any other court of concurrent jurisdiction. In support of this position the defendant relies mainly upon the decision of the Supreme Court of the United States in *Freeman vs. Howe*, 24 Howard, 450.

The only question in my mind is whether the defendants,

after having tried this case upon its merits, shall now, after a verdict, and practically on a motion for a new trial, be heard to allege want of jurisdiction in this court.

If, in the first instance, or at any time before a trial upon the merits, the defendants had submitted to this court that the property in question was in the custody of the State Court, and that the controversy over the ownership of it, which was initiated by the levy of the writ of attachment upon it as the property of Lee, could and should properly be remitted to that court for determination, this court, in the light of *Freeman vs. Howe*, and other cases in the Supreme Court of the United States involving the same principle, would undoubtedly have dismissed the cause and returned the property to the officers of the State Court.

The defendants might with propriety have said to this court: "This property is alleged to be the property of Robert I. Lee. It is seized as such; it is in the possession of the State Court as such. The law of the state of Illinois (chapter 11, § 29, Revised Statutes of Illinois) expressly provides that any third person claiming the property attached, as this property has been, can interplead and protect his own title; and therefore this court ought not to take from the State Court the controversy of which it had properly acquired jurisdiction." But instead of doing this the defendants plead to the merits, and try the case upon the merits; challenge the validity of plaintiff's title, charge that plaintiff's title is fraudulent as against the attaching creditor of Lee, and only after their defeat by the jury upon that issue do they raise the question of jurisdiction.

In the case of *Freeman vs. Howe* the marshal of the United States had levied a writ of attachment upon certain cars as the property of the railroad company, the defendant in the attachment. A mortgagee of the railroad company brought replevin in the State Court, and the Supreme Court of the

United States in that case held that the possession of the marshal could not be interfered with by the process of the State Court.

This case is not strictly analogous in its facts to that. Here the attachment was by the officers of the State Court, and the replevin was from the Federal Court. In *Freeman vs. Howe* the controversy in regard to the title to this property could not have been removed from the Federal into the State Court, but in this case it might have been removed from the State to the Federal Court. If the plaintiff in this replevin suit had interpleaded under the statute of Illinois in the original attachment suit, he undoubtedly could, under the act of 1875 in regard to the removal of cases from the State to the Federal courts, have removed the controversy between himself and the sheriff, as to the sheriff's right to attach this property as the property of Lee, from the State into the Federal Court; and ought not this court to presume that the defendants acted in this case upon the presumption that the controversy was one which might, in some form, be properly taken from the State into the Federal Court, and therefore waived all question as to the manner in which it was so brought before the Federal Court, and tried it here upon its merits, in the first instance, on the ground that they knew they might ultimately be compelled to do so?

It will be noticed that the extreme doctrine of *Freeman vs. Howe* is somewhat modified in its practical application by the subsequent case of *Buck vs. Colbath*, 3 Wallace, 334; and it is very clear, in the light of the two cases, that the Supreme Court does not now hold to the extreme doctrine that the controversy in regard to the ownership of this property, having originated in the State Court, must necessarily, under all combinations of fact, be held and determined there, and there alone.

In this case the court could have taken jurisdiction of the

parties, as the citizenship was such as to give it such jurisdiction of them, and it would only refrain from taking jurisdiction of the subject matter by reason of comity towards another court of concurrent jurisdiction. The parties to assert the right of the State Court to keep possession of the property were either the officers representing that court or the attaching creditor who had selected that forum. But neither of those parties disputed the jurisdiction of this court, on the ground that the subject matter belonged for any reason to the State Court, until after the trial on the merits, and then, I think, it was too late to raise the point. It seems to me that these defendants may be justly charged with having been willing to experiment with this court; and, after having had a trial and been defeated, they are now disposed to fall back upon a point which they ought to have raised in the first instance.

The motion to dismiss for want of jurisdiction is therefore overruled.

NOTE.—This case is now pending in the Supreme Court.—[REPORTER.

THE ALPENA.

District Court—Northern District of Illinois—July, 1881.

In Admiralty.

1. Admiralty—Petition to Limit Owner's Liability.—Each separate voyage or trip of a vessel is a separate venture, and the owners of the vessel can not limit their personal liability, under the Act of Congress,[1] as to any loss or damage except that occurring on the last voyage. The losses of different voyages cannot be grouped together and all the losers cited in to share what has been saved, and the owners exonerated from further liability.

2. Jurisdiction—When Petition May be Filed.—The District Court has jurisdiction to entertain a petition by the owners of a vessel for an apportionment of their interest in the vessel among the different sufferers, and the limitation of their liability under the Act of Congress, although at the time the petition was filed, no suit had been brought against them.

3. Liability for Loss of Life.—This limitation of liability applies to claims by the personal representatives of persons lost on the trip.

Petition of Goodrich Transportation Co. to limit liability for loss of steamer Alpena.

In this case the Goodrich Transportation Company alleged that it was the sole owner of the steamer Alpena, her engines, tackle, apparel and furniture; that such steamer was a vessel of upwards of twenty tons burden, duly enrolled and licensed for the coasting trade, and employed in the business of commerce and navigation between ports and places in different states and territories upon the lakes and navigable waters connected therewith.

[1] Revised Statutes, Sections 4283–5.

The Alpena.

That on the 16th day of October, 1880, upon the waters of Lake Michigan and within the admiralty and maritime jurisdiction of the United States, and while on a voyage from the port of Grand Haven, in the State of Michigan, to the port of Chicago, in the State of Illinois, with a cargo consisting of goods, wares and merchandise and passengers, said steamer Alpena, in a severe gale, foundered and sunk with all her said cargo and passengers, officers and crew on board, without the fault or neglect of duty of any of said officers or crew; and that such foundering, loss of life and cargo was occasioned without the design, neglect, privity or knowledge of the petitioner or any of its officers or agents; that said steamer was, when she entered upon said voyage, in good seaworthy condition, and properly officered, manned and equipped.

That said steamer, her engines, tackle, apparel and furniture, except some of the upper portion of her cabin, her piano, a few cabin doors, two small boats, and a piece of her main deck with the capstan attached, lie sunk in the waters of Lake Michigan, as nearly as petitioner can ascertain, off or south of the town of Holland, in the State of Michigan.

The petitioner further stated that the owners and consignors of goods on board said steamer were very numerous, and the petitioner had reason to believe that numerous suits may be brought by the owners of said cargo against the petitioner, as owner of said steamer, for the loss of such cargo, and also that suits will be brought against petitioner to recover damages occasioned by the loss of the lives of the passengers and crew of said steamer, and that the aggregate of the claims for said losses will greatly exceed the value of petitioner's interest in said vessel.

It was further alleged that a libel *in personam* was filed in this court on the 10th day of November last against petitioner by Louis Hutt, as owner of the schooner Stockbridge, to re-

cover damages alleged to have been sustained by said Hutt, by reason of a collision between said schooner and said steamer, on the 10th day of September, 1880, which suit is now pending.

On the filing of this petition an order was entered that petitioner convey all its rights, title and interest to whatever remained of said steamer, her engines, boiler, machinery, tackle, boats, apparel and furniture and freight pending at the time of the loss of said steamer to a trustee named in said order for the use and benefit of any and all persons having any claims against said steamer or said company as the owner thereof.

And it having been subsequently reported to the court that such conveyance had been duly made, a monition was, by order of the court, issued against all persons claiming any damages against said steamer, or the owners thereof, for any loss, destruction or injury, citing them to appear and make due proof of their claims, etc.

On or before the return day of this monition, a large number of claimants appeared specially, "not submitting to the jurisdiction of the court, but protesting against the same, solely for the purpose of objecting to the jurisdiction of the court," and excepted to the sufficiency of the petition, and to the jurisdiction of the court in the premises.

Cook & Upton, for petitioner.

W. H. Condon, for Louis Hutt.

Read & Wamsley, and *Alfred Russell*, for claimants.

BLODGETT, J.—The exceptions, which are twelve in number, resolve themselves practically into two questions:

1st. Can the liability of the owner of the steamer be limited, under the law, to any loss or damage except that occur-

ring on the last voyage, or the voyage in which the steamer was lost?

2nd. Does the petition show sufficient facts to clothe this court with jurisdiction to apportion the value of the owner's interest among the several persons who suffered damage on the voyage in which the steamer was sunk?

As to this first question, it was conceded on the argument that the steamer was, during the season of 1880, up to the time of her loss, engaged in running regular daily trips or voyages between the ports of Chicago and Grand Haven, on Lake Michigan, and that the collision between the steamer and the schooner Stockbridge occurred on a trip over a month prior to the commencement of the trip in which the steamer foundered and sunk.

I am clearly of opinion that the casualties or losses of different voyages cannot be aggregated or grouped together, say at the end of a season, or when a final catastrophe ensues, and all the losers be cited in to share what has been saved from shipwreck or other disaster, together with the pending freight, and have a decree entered exonerating the owners from personal liability. It seems to me that each voyage or trip, each separate journey which the ship makes from one port to another, must be treated as a separate venture involving its own particular hazards, losses, and earnings; and that when each such voyage is ended, it is for the owner to decide whether the losses have been such as to make it expedient for him to invoke the protection given by this act of Congress. If he does not decide to do this, but sends his ship upon a new voyage, he thereby concedes his personal liability for the damages incurred on the past voyage.

The owner, freighters and passengers on any particular voyage, may be said to have a common interest for that voyage. They may be compelled to contribute for jettisons made for the common safety under certain circumstances. But there

is nothing in common between the freighters and passengers of different voyages. Each shipper or passenger may perhaps be held to have had some personal knowledge or information as to the seaworthiness of the ship, or the skill of her officers or crew on the voyage in which he was interested, and to have acted on that knowledge to such an extent as in some degree to affect his, and the owner's relative rights; but no such knowledge can be predicated of any other voyage, and it would certainly seem to have been beyond the intended scope of this law that, after a series of losses happening on different trips or voyages, no one of which was of sufficient consequence to induce the owner to seek the benefits of this law, he can be allowed to combine them and obtain immunity from personal liability. The language as well as the evident reason of the statute, shows that this proceeding can only be had for the purpose of apportioning the owner's interest between several persons who have suffered "losses on the same voyage."

I am therefore of opinion that the petitioner cannot by this petition obtain relief as against the suit for collision with the schooner Stockbridge.

As to the second question. It is objected that under Admiralty Rules 54, 55, 56 and 57, promulgated by the Supreme Court, for the purpose of prescribing and regulating the procedure under this law, the court cannot entertain a petition by the owner for an apportionment of his interest in the vessel among the several sufferers, and for a limitation of his liability until some suit has been commenced for a loss, destruction, damage or injury sustained by one or more of such sufferers, and then such petition must be filed in the District Court of the district where such suit has been commenced. In other words, the position of these claimants is, that inasmuch as this suit for collision with the Stockbridge, now pending in this court, is not for a damage accruing on the final or last voyage of the steamer, that that suit does not

aid or confer jurisdiction, and the petitioner not showing that any libel had been filed in this court or suit brought in this district prior to the filing of the petition, this court has no jurisdiction in the premises.

It must be conceded, I think, that if this court only has jurisdiction of this subject-matter and the parties, by virtue of the rules in question, then there is much force in the position of these respondents. But it seems to me, that it was not the intention of Congress to suspend the right of the ship-owner to invoke the provisions of this law until suits or libels *in personam* should be actually instituted against him. The language of the Statute is: "And the owner of the vessel * * * may take the appropriate proceedings in any court for the purpose of apportioning the sum for which the owner of the vessel may be liable among the parties entitled thereto." Here is no intimation that the owner must wait until he has been sued, before he can "take the appropriate proceedings in any court;" while from the nature of the owner's liability and the scope of the relief furnished by this law, it would seem that proceedings should be taken where the testimony necessary to establish the facts which secure immunity to the owner is available.

Rule 57 says: "The said libel or petition shall be filed, and the said proceedings had in any District Court of the United States in which said ship or vessel may be libelled, to answer for any such embezzlement, loss, destruction, damage or injury; or if such ship or vessel be not libelled, then in the District Court for any district in which the said owner or owners may be sued in that behalf."

There is an obvious convenience, if a libel has been filed, or suit brought for any loss, in requiring the owner to go into the same district to take the steps which shall limit his liability, because this brings all the claimants, both those who have sued and those who have not, together. But suppose libels

filed or suits brought simultaneously in different courts, against the same or different owners, which might often happen, which court, then, is to have jurisdiction of the proceedings to limit liability? All the authorities now, I think, concur in the conclusion that the measure of the ship-owner's liability is the value of the ship immediately after the loss or damage complained of. If the loss occurs by the beaching of the vessel, it is her value as she lies upon the beach; if it occurs by the sinking of the vessel, it is her value and the value of her belongings as she lies sunken. Now, in order to save what is thus left for the benefit of shippers and the owner, it is necessary, in almost every conceivable case, that immediate steps be taken to sell and convert the property into money, to be held for those entitled to apportionment, and this can only be done by some appropriate proceeding in court, without delay. What is available may be perishable, or need immediate care, and the owner, by acting without the direction or sanction of a court in that regard, might at least hazard if he did not lose his right to protection under the law. So, too, the vessel might be in condition to be repaired, and her value for the purposes of reparation would measure the owner's liability to his shippers. If he repairs before this value is properly ascertained by appropriate proceedings in some court under this law, he runs the risk of losing all the protection the law affords him.

It seems, therefore, quite satisfactory to my mind that the Supreme Court did not intend by its rules to say that no proceeding to apportion the share of each loser in the value of the vessel should be had, until some one of the losers should have commenced a suit, but the court only intended to say that if the owner delayed such proceedings until a suit had been commenced, then he should commence such proceeding in the District Court where such suit was commenced; but if the shippers whose property has been lost or damaged by a

shipwreck, or other disaster to which the owner is not privy, do not see fit to commence suit at once, I can see no reason or principle in the law itself which shall compel the owner of the vessel to lie silent until perhaps his testimony may be lost, or it becomes either impossible or difficult to estimate the value of his interest in the vessel, and only ask the aid of the court when suit is begun against him, which may be any time before bar of the Statute of Limitations.

I may also add that the language of the last clause of the 57th Rule above quoted, does not literally or necessarily imply that a suit must have been brought in order to confer jurisdiction. The language is just as susceptible of the construction that this proceeding, if no libel has been filed against the ship, may be commenced in the District Court of any district in which the owner is liable to be sued. That is, if the owner is liable to be sued in the district in which he resides, he may commence this proceeding in the District Court of such district, if no libel has been filed against the ship elsewhere.

In this case, the remnants of this vessel so far as recovered, are within the jurisdiction of this court; the freight pending has been paid to the trustee appointed. The sunken hull and machinery may not be within the territorial jurisdiction of the court, but the title, wherever they are, has been conveyed to the trustee.

I therefore conclude that this court has jurisdiction to entertain this proceeding although no suit had been brought in this court or district by any one who would be bound by this proceeding at the time this petition was filed.

All the claims presented so far, excepting that of Hutt for collision with the Stockbridge, are by administrators of persons whose lives were lost by the wreck of the steamer, and they make the further question that the Act of Congress does not protect the vessel owner from liability for loss of life. I

do not consider that the character of these claims cuts any figure in determining the question of the jurisdiction of this court over this petition, because if liabilities of this character are not covered by the Act of Congress, then no order of the court in this matter can affect them.

I, however, had this question before me in the case of the Sea Bird[1] a few years since, and came to the conclusion that this class of claims was within the act, and no light which has been thrown on the subject by later decisions and the discussion of this case has changed my view in that regard.

Most of the statutes in this country giving a right of action for death caused by negligence, and notably those of Illinois and Michigan, one of which must control in this case, have been substantially copied from Lord Campbell's Act, as it is called in England, and which was enacted prior to the Act of Congress limiting liability of ship-owners and they proceed upon the principle that the heirs, executors and administrators of the person whose life is lost by the negligence of another, have a pecuniary interest in such life. In some of the states the amount recovered goes directly to the widow and next of kin, and in others it goes into the general assets, so that the persons entitled to maintain an action may be said to have a property interest in the person whose life is lost, and it is because of this property and pecuniary interest that a right of action is given. I do not look upon these suits as penal suits, punishing the owner for his negligence, but only as a remedy for the recovery of the pecuniary interest which the survivors of the person whose life is so lost have in his life.

NOTE.—Affirmed by the Supreme Court, in *Ex parte Slayton*, 105 United States, 451.[—REPORTER.

[1]Not reported.

MARTIN T. CALKINS vs. THEOPHILUS F. BERTRAND *et al.*

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—JULY, 1881.

IN EQUITY.

1. PATENT LAW—MEASURE OF DAMAGES FOR INFRINGEMENT.—When a complainant's patent covers but one of many features of the machine manufactured by defendants, the profits on the entire machine cannot be reckoned as damages, but only the gains arising from the use of the special device or element covered by the complainant's patent.

2. BURDEN OF PROOF.—And in such case the burden of proof is on the complainant to show how much of the profits made by defendants upon the whole machine, is due to the use of complainant's patented device.

3. NOMINAL DAMAGES.—Where the complainant's testimony only tended to show the profits made by defendant on the entire machine; and defendant furnished affirmative evidence, showing that he made no extra profit from the use of complainant's device: *Held*, that a "division of profits" made by the master must be set aside, and complainant be awarded only nominal damages.

4. COSTS.—In such case where the defendant has persistently fought the validity of complainant's patent and the question of infringment as well as the amount of damages, the court will award all the costs against the defendant.

Offield & Towle, for complainant.

West & Bond, for defendants.

BLODGETT, J.—This suit was brought by complainant against the defendants for infringement of certain letters-patent issued by the United States to Irulius R. Smith, on the 24th of April, 1860, and re-issued to Julius Gerber, April 26th, 1870, for "an improvement in cultivators."

A hearing was had upon pleadings and proofs, and a decree

entered finding that defendants infringed the first claim of the re-issued patent, which is for

"An auxiliary frame carrying two or more shovel standards on each side, as shown, when said frame is hinged to the pole between the evener and the neck yoke as described for the purposes set forth." And a reference was made to the master to take proofs and state an account of the gains and profits received by defendants, and the profits of which complainant had been deprived, and the damages sustained by him in consequence of the infringement so found and adjudged.

The proof taken on the hearing on the question of infringement showed that the complainant's patent is applicable to what is known to the trade as a "Riding Straddle Row Cultivator;" that is, a wheel cultivator, on which the operator rides, provided with devices which enable him to drive the team and manage the plows from his seat.

The defendants' cultivator belongs to the same class, but the devices by which the plows are manipulated, and many of the operative parts of their machine are not common to the complainant's machine. The only feature of complainant's patent which defendants' machine was held to infringe being that of hinging the beams to the pole or tongue between the evener and neck-yoke so as to secure what complainant calls the "long swing" motion, peculiar to his cultivator.

It will thus be seen that defendants were not found to infringe complainant's entire machine, as covered by his re-issued patent, but only one element or feature of it. Other features peculiar to defendant's machine the complainant had no interest in, and, it is claimed, are covered by patents held by defendants.

Upon this reference so made to him, the master reported the gross profits made by defendants on all machines made

by them during the years in question, at $33,354.75, from which he deducted ten per cent. as manufacturer's profits, leaving a net profit of $30,023.75 made by defendants on the machines made by them.

To this report exceptions were filed by the defendants, and the matter was re-referred to the master for further action, with the following directions: "To further inquire into and report more fully what profits have been made by the defendants upon the machines manufactured by them during the years 1870 to 1874, inclusive, and also what portion of said profits reported by him as made by the defendants on their said machine, is or may be due to the patented devices and improvements of the said defendants contained in said machines, and the value of the said defendants' improvements found in their said machine which ought to be deducted from the gross amount of profits found by said master."

Upon this re-reference the master has made a further report, in which he has found the total number of machines made by the defendants in all the years in question, as follows: 1870, 543; 1871, 1,300; 1872, 937; 1873, 740; 1874, 500; total, 4,020.

That the gross profits made by defendants on said machines amounted to $41,217.50, from which he has deducted for rent, interest, taxes, advertising, losses on bad debts and wear of machinery, $9,838.42, and for clerk hire, at the rate of a thousand dollars a year to each defendant for four years, making a total of $8,000; making total of deductions $17,838.42, and leaving a net profit of $23,470.08.

The master concludes, and so reports to the court, that one-half of the net profits so found should be deducted as the proportionate amount due to the patented devices and improvements of the defendants contained in said machines, leaving the sum of $11,735.04 as the amount of profits made by defendants, which should be accounted for and paid to

complainant for such infringement. The reason given by the master for dividing the profits equally between the complainant and the defendants, is that the proof furnished no reliable *data* on which to fix the amount of profits made by defendants from the use of complainant's device in their cultivators, or for showing the amount of deduction which ought to be made from the net profits of the business by the use of defendants' own patented devices, and that he, therefore, resorted to a division of the profits as the most equitable and just rule which he could adopt under the circumstances. To this finding and report of the master, defendants have filed thirteen exceptions.

The first seven exceptions assert in substance that it was incumbent on complainant to show by the proof that defendants not only made profits by the use of complainant's device in their machine, but the specific amounts of such profits; that complainant has not only failed to make such proof, but also that the testimony taken and reported, affirmatively shows that the defendants have made no profits by the use of complainant's "long swing" feature in their machines.

These exceptions I shall first consider.

In a brief opinion directing a second reference to the master, I stated that the master would be directed to hear proof "as to what this 'long swing' element in defendants' cultivator, which belongs to complainant, is worth to defendants' machine; how much it adds to the value of defendants' machine —the salable value."

I assume that this must be the basis of the inquiry. I consider the law to be well settled that when a complainant's patent covers but one of many features of a machine, the gains on the whole machine cannot be reckoned as damage, but only the gains arising from the use of the special device or element covered by the complainant's patent. If the other parts of the machine which go to make the whole a complete

and operative organism manufactured by defendants, are covered by patents in which complainant has no interest, or even if they are public property, the complainant cannot claim profits made by the use of such parts even in combination with his device. For illustration, if an operative cultivator could be made without the use of any patented device, but by the use of a certain patent a better or improved cultivator can be made, the damages to the patentees for the use of a patent so used would be the increased value given the machine by the use of the patent, not the profits on the entire machine.

This rule was recognized in the *Cawood Patent* case, 94 United States, 710, where the Supreme Court said: "In settling an account between a patentee and an infringer of a patent, the question is, not what profits the latter has made in his business, or from his manner of conducting it, but what advantage has he derived from his use of the patented invention?"

So, also, Mr. Justice Hunt said, in *Gould M'f'g Co. vs. Cowing*, 8 Official Gazette, 279: "I understand the rule to be settled that when the patent is for an improvement upon a machine, the damages for an infringement of such patent are confined to the profits made by the use of the improvement only and not by the manufacture of the whole instrument. * * What advantage did they have that they would not have had if they had built their machine without the improvement?"

To the same effect are *Seymour vs. McCormick*, 16 Howard, 490; *Philip vs. Nock*, 17 Wallace, 460; *Mowry vs. Whitney*, 14 Wallace, 620. Upon the original reference, the only proof offered by complainant was as to the profits realized by the defendants upon the entire machine as made by them. The proof showed that the defendants' machine not only included the feature of hanging a plow beam to the tongue between the evener and neck yoke, but also contained at least ten

enumerated devices covered by a patent owned by defendants, and which defendants contend gave the chief practical value to their machine.

In the order of re-reference the master was directed to inquire and report more fully what "profits have been made by defendants upon the machines manufactured by them. * * And what portion of the profits reported by him as made by defendants on their said machine is, or may be due to the patented devices of defendants contained in said machine, and the value of defendants' improvements found in their machines which ought to be deducted from the profits found by said master."

In the new proof taken before the master complainant has not attempted to show how much of the profits made by the defendants is due to the use of the patented devices of the defendants, also used in the machines. The only new proof taken by complainant relates to defendants' profits on the entire machine, and not to the use of complainant's device in defendants' machine.

"The plaintiff must show his damages by evidence. They must not be left to conjecture by the jury. They must be proved and not jumped at."[1]

"Damages must be proved; they are not to be presumed."[2]

"The patentee must in every case give evidence tending to separate or apportion the defendants' profits and patentee's damages between the patented features and the unpatented features; and such evidence must be reliable and tangible, and not conjectural or speculative, or he must show by equally reliable and satisfactory evidence, that the profits and damages are to be calculated on the whole machine, for the reason, that the entire value of the whole machine, as a marketable

[1] *Philips vs. Nock*, 17 Wallace, 460.

[2] *Blake vs. Robertson*, 4 Otto, 733.

article, is properly and legally attributed to the patented feature."[1]

In the light of these authorities, it is quite clear that the complainant has not furnished by his proof any reliable standard for computing or assessing his damages. He has not shown how much of the defendants' profits were made by the use of his device.

But the defendants, upon the re-reference, have given proof showing that their machine derived no increased value in the market from the use of the complainant's "long swing" feature.

Upon the second hearing before the master, the defendants produced a machine constructed with all the leading devices characteristic of the defendants' machine, except that they hinged the plow beams at the evener instead of hinging them forward of the evener, or between the evener and the neck-yoke. It is a full sized operative machine—was constructed and placed at work in a field in the presence of a number of intelligent witnesses. In the same field was also one of the defendants' machines, constructed with the "long swing" element precisely as it was claimed to infringe the complainant's patent, where it was hinged between the evener and the neck-yoke, giving a longer plow beam, and giving a longer vibrating motion to the plows from the increased length of the beam. This machine, constructed after the model No. 17, was tried in the presence of these witnesses, and among them was Mr. Jacob Beihl, who appears to have been a manufacturer and machinist.

After the exhibition he testified that, in his opinion, attaching the shovel frame to the tongue in front of the evener had no value in defendants' machine—that the cultivator made like Exhibit No. 17 worked better and easier, and was better than the defendants' machine like No. 5; and

[1] *Garretson vs. Clark*, 14 Official Gazette, 485.

that machines like No. 17 would have been more salable, and the profits thereon would have been increased rather than diminished. This witness attributes all the profits to other features than the "long swing."

The testimony of Mr. Anthony Haines, a manufacturer and gentleman of great intelligence, and that of Alfred Crill, is to the same effect.

This affirmative proof that defendants made no profits by the use of complainant's device, supplemented to the lack of proof by complainant, as to what profits were made by the use of complainant's "long swing," certainly makes no record from which it can be said any profits or damages are shown. It cannot be assumed, in the absence of proof, that half or any other share of the profits made by defendants were due to the use of complainant's device.

The other exceptions which were taken in the case, had reference to the failure on the part of the master to make certain allowances to the defendants, but as I do not consider that they are material in the view I take of the questions which are presented before me, I shall not review or discuss them.

The only question, then, that remains, is this, the complainant having shown no damages in the case, will be entitled to a decree only for nominal damages, and the question is, who shall pay the cost of the reference? It was contended on the argument that inasmuch as no damages have been shown on the part of the complainant, the costs of the reference should be assessed against the complainant.

I cannot subscribe to this view of the question, for this reason: This suit was commenced in 1873 or 1874, and the defendants persistently fought and resisted not only the validity of the complainant's patent, but the question of infringement. If they had said frankly, at once, as they now say at the end of the conflict: "We get no benefit and make

no profit by the use of that part of our machine which infringes yours, and therefore we are willing to abandon it; we can make just as good a cultivator without using it," and had at once changed or modified the form of their cultivator in that regard, they would have stood in the light before the court of acting fairly and frankly with the complainant, but instead of that they resisted the validity of the complainant's patent, denied that they infringed, and fought him to the bitter end upon the question of infringement, and when that question was adjudged against them, fell back upon the question of damages. It seems to me, therefore, upon the evidence that the entire expense of the reference should be adjudged against the defendants.

The exceptions will be sustained so far as anything but nominal damages are found by the master, and a decree entered giving judgment for nominal damages and costs, against the defendant.

NOTE.—The patent involved in this case was before this court and sustained in *Calkins vs. Bertrand*, 6 Bissell, 494.[—REPORTER.

MICHAEL WINTER vs. DANIEL SWINBURNE *et al.*

CIRCUIT COURT—EASTERN DISTRICT OF WISCONSIN—JULY, 1881.

IN EQUITY.

1. CREDITOR'S BILL—FEDERAL JURISDICTION—A creditor's bill cannot be maintained in the United States Circuit Court, in aid of an execution on a money decree recovered in the District Court in admiralty, or for enforcement or collection of such decree, when all the parties to the bill are citizens of the same state.

2. ANCILLARY SUIT.—Jurisdiction in such case cannot be sustained on the ground that the bill in the Circuit Court is ancillary to the judgment or decree of the District Court, and a mere continuation of the proceedings in that court, nor on the ground that it arises under the Constitution and laws of the United States.

3. "REMOVAL ACT" CONSTRUED—JURISDICTION.—Though the jurisdiction in admiralty is given by the federal laws and Constitution, a creditor's bill to enforce a money decree in admiralty, is not a case "arising under the Constitution or laws of the United States," within the meaning of the first clause of the first section of the Removal Act of March 3, 1875.

The facts in this case were as follows:

In 1880, a money decree was recovered against the defendants for the sum of $2,148.71, in the District Court of the United States, for this District, in a cause of collision, in admiralty, wherein the present complainant was libellant and the defendants were respondents. There was no appeal to the Circuit Court, and the decree in the District Court was final. Execution was issued thereon, and was returned *nulla bona*. Thereupon, the libellant in that case and complainant here, filed the present creditor's bill in the Circuit Court, to reach assets, effects and equitable interests of the defendants, in satisfaction of the decree in the District Court.

The defendants not appearing, the usual orders were duly entered, referring the case to a master, appointing a receiver of the property, things in action and effects of the defendants, and requiring the defendants to make conveyances to the receiver, and to submit to examination, on oath, before the master. On the return day of the master's summons, the defendants appeared specially, and by their counsel objected to the proceedings as not within the jurisdiction of the court, and declined to be sworn and examined. Whereupon the record was certified to the court for its action thereon, and argument has been had on the question of jurisdiction. The ground of objection to jurisdiction was, that the complainant and the defendants are all citizens of Wisconsin and that therefore this suit cannot be maintained in this court.

Winfield Smith, for complainant.

Geo. D. Van Dyke, for defendants.

DYER, J.—In effect, this is an application for attachment of certain of the defendants for contempt, because of their refusal to submit to examination on oath, before a master, pursuant to an interlocutory decree heretofore entered in this cause.

The precise question is, Can a creditor's bill be prosecuted in the Circuit Court in aid of an execution on a money decree recovered in the District Court, in admiralty, or for enforcement of such a decree, all the parties to the bill being citizens of the same state? The question is a novel one, and no decided case covering the precise point involved, has been found.

It is first contended by counsel for the complainant, that jurisdiction may be derived from the subject-matter of the controversy, irrespective of the citizenship of the parties. This is upon the theory that the creditor's bill is ancillary to

the decree in the District Court, and a continuation of that proceeding; and that, therefore, the case is within the rule or principle laid down by the authorities, that where a bill filed on the equity side of the court is not an original suit, but ancillary and dependent, jurisdiction is maintained without regard to the citizenship of the parties. I have always supposed that this principle was only applicable where the ancillary bill was filed in the same court in which the original suit was brought, and it may not be unprofitable to notice with some care the authorities bearing on the question, most of which were cited on the argument.

In *Freeman vs. Howe*, 24 Howard, 450, it was held that where property of A is wrongfully seized under a writ of attachment against B, a petition for relief by the rightful owner may be heard, and relief granted without regard to the citizenship of the parties. The court say that "the principle is, that a bill filed on the equity side of the court to restrain or regulate judgments or suits at law in the same court * * is not an original suit, but ancillary and dependent, supplementary merely to the original suit out of which it had arisen, and is maintained without reference to the citizenship or residence of the parties."

In *Railroad Companies vs. Chamberlin*, 6 Wallace, 748, a bill was filed by a Wisconsin railroad company to set aside a judgment and a lease to secure the same, and another railroad corporation of the same state having become the equitable owner of the lease, was admitted as defendant, and also filed a cross-bill to have the judgment enforced. The Circuit Court dismissed the cross-bill for want of jurisdiction, the parties being all citizens of the same state; and it was held that this decree was erroneous, the proceeding being merely ancillary to the judgment which was recovered in the same court as that in which the cross-bill was filed; and Mr.

Justice Nelson, in the opinion, observes that the bill could be filed in no other court.

In *Jones vs. Andrews*, 10 Wallace, 327, it was held that a bill for an injunction to restrain proceedings of garnishment against the complainant's property instituted in the Circuit Court, and also praying the benefit of a set-off against the garnishing creditor's demand, is not an original suit, but is a defensive or supplementary suit, in which the jurisdiction of the court does not depend on the citizenship of the parties but on the cognizance of the original case.

If a judgment at law be recovered in a Circuit Court, the defendant in the judgment may file a bill in that court to enjoin the judgment, against the representative of the plaintiff in the judgment, though that representative be a citizen of the same state as the defendant in the judgment; it is but a continuation in substance of the original suit.[1]

A creditor's bill is held to be a mere continuation of the suit at law, as it merely seeks to obtain the fruits of the judgment, or to remove obstacles to the remedy at law; and since, therefore, it is not an original suit, but rather the extension of a former controversy, a change of residence of the plaintiff to the state where the defendant resides, will not affect the jurisdiction of the court.[2]

In all the cases thus far cited, it will be observed that jurisdiction was supported on the ground that the suit in which the question of jurisdiction arose, was auxiliary or supplementary to the original suit, and it is further observable of all the cases, that, without exception, both suits were brought in the same court. Other authorities showing when creditor's bills, cross-bills, bills of review and other dependent or auxiliary suits may be maintained between citizens of the

[1] *Dunne vs. Clarke* 8 Peters, 1.

[2] *Hatch vs. Dorr*, 4 McLean, 112. See also *Hatfield vs. Bushnell*, 1 Blatchford, 393.

same state, are collected and cited by the learned judge of the Eastern District of Michigan, in *In re Sabin*, 18 Bankruptcy Register, 157.

On the argument, attention was called to *Noyes vs. Willard*, 1 Woods, 187, which was a case where an assignee in bankruptcy recovered a fraudulent judgment in the District Court against an alleged debtor of the bankrupt and the judgment debtor filed a bill in the Circuit Court to enjoin execution upon the judgment; and it was held that the fact that all the parties were citizens of the same state, did not oust the court of jurisdiction. But I do not regard this case as sustaining the argument in favor of jurisdiction in the case at bar, because in the case cited, the jurisdiction of the Circuit Court was clearly maintainable under that provision of the bankrupt law which expressly gave to Circuit Courts concurrent jurisdiction with the District Courts of all suits at law or in equity brought by an assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee touching any property or rights of property of the bankrupt, transferable to or vested in the assignee; and it was by virtue of this provision of the law that the jurisdiction was maintained.

United States vs. Stiner, et al., 8 Blatchford, 544, is also cited. This was a creditor's bill filed in the Circuit Court, and founded on a judgment recovered by the United States in the District Court, and the question was whether the Circuit Court had jurisdiction of the case. It was held without hesitation, by Judge Blatchford that jurisdiction was plainly conferred by the 11th section of the act of September 24th, 1789,[1] which gave to the Circuit Courts original cognizance of all suits of a civil nature at law or in equity, where the matter in dispute exceeded, exclusive of costs five hundred dollars, and in which the United States were plaintiffs.

[1] 1 Statutes at large, 78.

Nothing could be clearer than that under this express statutory authority a creditor's bill could be prosecuted by the United States in the Circuit Court, to enforce payment of the judgment recovered in the District Court.

Since direct adjudication of the precise question involved is wanting, we are left to deal with it in the light of such general principles as may be applicable. And first, it may be remarked that the Circuit Court has no general supervisory jurisdiction over the proceedings of the District Court in admiralty. Its exercise of supervisory control is limited to the case of an appeal or other equivalent and direct mode of procedure, wherein a particular controversy is made the subject of review. In other words, a general jurisdiction of the sort invoked here cannot be borrowed by the Circuit Court from the inferior court, on the ground that the original proceeding in the latter court was one in admiralty. The final judgment in the District Court was a judgment *in personam* and became a simple money demand, enforceable as such by suitable proceedings in a court having authority to entertain such methods of procedure as the case might require. The Circuit and District Courts of the United States, are distinct and separate courts, each having its own sphere of jurisdiction. In some classes of cases, their jurisdiction is by statute made concurrent. Otherwise it is as distinct as is the subject-matter of the controversies with which they may have to deal. As we have seen from the authorities, the theory of ancillary bills, except as special statutes may govern particular cases, pre-supposes an original action in the same court in which the ancillary bill is filed. It was asked on the argument, if the Circuit Court had only common law jurisdiction, and if as part of the federal judiciary system there was a separate court having only chancery jurisdiction, whether the latter court might not entertain a creditor's bill, to enforce a judgment recovered in the court of law. Un-

doubtedly that would depend upon the constitutional and statutory authority conferred upon the court having exclusive chancery powers. But as a more effectual test, suppose the case in the District Court, upon which the present bill is based, had been one between two citizens of Michigan, and there had been an appeal to the Circuit Court, followed by affirmance of the judgment of the District Court, could it be claimed that the libellant could file a creditor's bill in the U. S. Circuit Court of Michigan to enforce satisfaction of the judgment or decree in the Circuit Court of Wisconsin? Obviously not. And yet the jurisdiction of Circuit Courts of different circuits is scarcely more distinct than that of the Circuit and District Courts of the same district. The fact that the same judge may hold both the Circuit and District Courts does not, of course, make them the same court, nor give them any nearer connection than they would have if held by different judges in different localities in the same district. And therefore, it will not do to say that the judgment of the District Court was the judgment of a Federal Court, and that the present bill filed in the Circuit Court is a bill pending in a Federal Court, and so that the two proceedings are in the same court. The two courts, it is true, exist under one system, but they are none the less distinct and separate courts in the exercise of their respective powers and jurisdictions. Indispensable to the exercise of their original jurisdiction by the Circuit Courts, except in certain enumerated cases, is the requisite citizenship of the parties, and the argument *ab inconvenienti*, strongly as it was urged by counsel, is not sufficiently potent to overcome the fact that in view of the considerations already suggested, the present bill must be regarded as an original bill in the Circuit Court, and that the jurisdiction of that court is absolutely dependent upon such citizenship of the parties as does not exist here.

A good deal of stress was laid by counsel on the language

used by Judge Blatchford in his opinion in the case of *The Blanche Page*, 16 Blatchford, 6, wherein he held that a court of admiralty of the United States has no power to enforce a final decree for the payment of money, against sureties, by the sequestration of their property, according to the practice of the courts of equity. In his opinion the learned judge says: "There is no statute which confers on a court of admiralty of the United States those powers of sequestering property which appertain to a court of equity, nor is there any rule which does so. The libellants have judgments, and after executions have been issued and returned unsatisfied, they can resort to the proper court to reach any property which the debtors may have. But this court sitting in admiralty is not such court. The fact that the libellants could not recover judgments on the stipulations or bonds in any other court than the admiralty court does not prevent their resorting to other courts when they have obtained judgments in the admiralty court, to enforce such judgments." From this language the inference is drawn, that, by the expression "resort to the proper court," was meant resort to the proper Federal Court, i. e., the Circuit Court. But the language of the opinion does not, I think, warrant that conclusion. Its meaning simply is, that proceedings in such a case, to reach the property of the debtors, must be taken in the proper court; whether it be the State Court or the Federal Court must necessarily depend upon jurisdictional rights.

But it is further urged that jurisdiction of the present bill may be derived from the first clause of the first section of the Removal Act of March 3, 1875, which provides that "the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several states of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the

Constitution or laws of the United States." The argument is, that the matter in dispute here, arises under the Constitution and laws of the United States; that the decree in admiralty which is the foundation of this suit, is the creature of the federal laws and Constitution, and that as this is a suit in equity for enforcement of such a decree, it is a suit within the meaning of the provision of the statute above quoted. I cannot concur in this view, and do not think it is supported by the adjudged cases bearing on the point. To uphold jurisdiction under the clause referred to in the act of 1875, I am of the opinion that it is not sufficient for the party merely to trace title or right through undisputed proceedings which may have been previously had by virtue of laws of the United States. The construction of the Constitution or of a federal statute must be involved, or the right to present relief must be based upon the Constitution or a statute, to make a case arising under the Constitution or laws of the United States, within the meaning of the act. Here there is no dispute over the original suit in admiralty. The decree in that suit and the complainant's right to it are admitted. They are not even sought to be avoided, and upon the point under consideration there is analogy between the present case and *Ex parte Smith*, 94 United States Reports 455. In that case certain parties brought an action of ejectment in the Federal Court of Tennessee. The plaintiffs claimed title through certain proceedings under which the lands in suit were sold by the United States tax commissioners by virtue of an act of Congress providing for the collection of direct taxes in insurrectionary districts. All the parties to the suit were citizens of Tennessee, and jurisdiction was claimed on account of the subject-matter of the action; but the Supreme Court held that to sustain the jurisdiction, it was incumbent on the plaintiffs to show that the action arose under the revenue laws of the United States, and that this was not

shown by merely claiming a title through such laws when the title, in that respect, was not disputed.

The subject is also discussed in *Hartell vs. Tilghman*, 99 United States 547, where it was held that a suit between citizens of the same state cannot be sustained in the Circuit Court as arising under the patent laws, where the defendant admits the validity and his use of the plaintiff's letters-patent, and a subsisting contract is shown governing the rights of the parties in the use of the invention. In analogy to what is said by the court in that case, it may be said of the case at bar that the relief sought by the present bill is not founded on, nor does it arise from the laws of the United States authorizing or regulating proceedings in admiralty. There is no controversy here that requires for its decision a reference to those laws, or a construction of them. There is no denial of the force or validity of the decree in the District Court, nor of complainant's right to that decree. In no phase of the case is any federal question involved, and therefore if this were a cause pending in the State Court it could not be removed from the court of last resort of the state to the Supreme Court of the United States.[1]

But it is supposed that *Seymour vs. The Phillips and Colby Construction Company*, 7 Bissell, 460, is an authority which supports jurisdiction in the case at bar, under the act of 1875. I think, however, the cases are distinguishable. In the case cited, the facts were that the plaintiffs recovered a judgment in the Circuit Court against the Construction company, and thereupon the defendant in that case sued out a writ of error to the Supreme Court, and gave a supersedeas bond to which the defendants in the case decided, were parties, as obligors. The writ of error was dismissed and the judgment of the court below in the first case was affirmed. Thereupon a suit was brought upon the bond (which is the case cited), and

[1] *Bolling vs. Lerner*, 91 U. S. Reports 594.

the defendants pleaded to the jurisdiction of the court on the ground that all the parties were citizens of Illinois. Judge Drummond held that the dispute was one arising under the laws of the United States within the act of March 3, 1875, and sustained the jurisdiction. It is noticeable, first, of this case, that the original action against the Construction company, and the suit on the supersedeas bond, were both brought in the Circuit Court, and from remarks of the learned judge in the opinion, it is evident he was inclined to the view that the latter suit was but an incident to the original one; that they were inseparably connected together, and that on that ground jurisdiction was maintainable, as in the ordinary case of a purely ancillary action. But going further the Judge says that the bond sued on was a security given under a statute of the United States and a rule of the Supreme Court, and therefore that the damages and costs to be recovered in a suit on the bond must be determined by a construction of the statute, because the statute fixed the measure of damages and governed the rights of the parties. So, unlike the case at bar, the cause of action and the measure of recovery in the suit on the supersedeas bond, were directly grounded on a federal statute, and whatever questions might arise would, *ex necessitate*, be questions arising under a law of the United States, and to be determined with the law and the rules of the Supreme Court as the basis of whatever judgment might be rendered. And Judge Drummond, as a test, puts this question: "Is it not * * manifest that if a State Court took jurisdiction of such a controversy, it might ultimately, under the law or under the rule, be carried to the Supreme Court of the United States?" Certainly the distinction is a plain one between that case and the one in hand, when the particular features of the two cases are considered. Here is a creditor's bill—an original bill in this court—raising no question as to the validity of the decree in

the District Court, involving no construction of any federal statute nor of any rule of court, nor the exercise of any power having its source in any such statute or rule, and presenting no controversy or question which would make the case removable ultimately to the Supreme Court. The want of analogy between the two cases, it seems to me, is made even more apparent by further language used by Judge Drummond in his opinion. He says speaking of the bond:

"It is an indemnity given in pursuance of a law of the United States; the measure of the liability of the party, and the rights both of the plaintiffs and of the defendants, depend upon a law of the United States, and a rule of the Supreme Court of the United States. It is impossible to take a step in the progress of the cause in order to determine the rights of the parties, without looking at the law and the rule as the guide of the court, and controlling its judgment in the determination of that case." Not so with the case at bar; and, on the whole, I am of opinion that the jurisdiction of this court over the present bill cannot be maintained on either of the grounds urged, and therefore, that the present proceeding cannot be entertained.

NOTE.—The Supreme Court of Illinois seems inclined to hold that the State Courts have no jurisdiction of a creditor's bill upon a judgment rendered in the Federal Court. *Steere vs. Hoagland*, 39 Illinois, 264. —[REPORTER.

UNITED STATES *ex rel.* ÆTNA LIFE INSURANCE CO. vs. THE BOARD OF TOWN AUDITORS OF THE TOWN OF BROOKLYN *et al.*

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—AUGUST, 1881.

MANDAMUS—JUDGMENTS AGAINST TOWN—PAYMENT—DEMAND—Where a series of judgments have been rendered against a town, and for a number of years no action has been taken by the town authorities to provide for their payment, a *mandamus* will be issued against such town authorities to compel them to levy a tax to pay the judgments, although no formal demand for their payment has been made.

Bailey & Sedgwick, for relator.

Edsall & Hawley, for defendants.

DRUMMOND, J.—This is an application by the relator, after due notice, for a peremptory mandamus against the defendants to take the necessary steps under the law to assess a tax for the payment of various judgments which have been rendered in this court against the town of Brooklyn, Lee county: One on the 13th of March, 1876, for $5,511; one on the 24th of June, 1879, for $22,644.30; one on the 31st of March, 1880, for the sum of $5,120.50, and one on the 24th of December, 1880, for $5,615.68, all with costs.

It appears by the petition that these judgments were recovered on the interest coupons on bonds issued by the town of Brooklyn to the Chicago & Rock River Railroad Company, in pursuance of law and in accordance with a vote of the electors of the town. It also appears that the main question involved in these various judgments has in one of the cases

been decided by the Supreme Court of the United States, affirming the validity of the judgment rendered by this Court.[1]

It is alleged and admitted that the town has no property or effects which could be reached by execution on the judgments. It is also stated that the judgments are all in full force and in no part satisfied; which statement is not denied by the answer which has been put in. It is averred that the defendants have neglected and refused to make provision for the payment of the interest on the bonds, and that a formal demand for the payment of the several judgments would be unavailing. This is not with the necessary explicitness denied by the answer.

There can be no doubt that these judgments are a town charge, within the meaning of the statute of the state upon the subject.[2]

The board of auditors has answered the petition and states merely that it is not *advised or informed* whether the town has refused or neglected to pay the judgments, or threatened that it will not pay the same, and *so* denies the truth of the same.

The main defense set forth in the answer to the petition is, that a demand had not been made by the relator or by any one on its behalf for the payment of these judgments prior to the filing of the petition in this case. The judgments have been offered in evidence, and there is no controversy about the existence of the judgments and their non-payment. The town clerk has demurred to the petition, and the petition, answer and demurrer have been argued together by the counsel and considered by the court, and the question is, whether, upon what may be regarded as the conceded facts of the case, the relator is entitled to a peremptory mandamus requiring the board of auditors and the clerk to proceed in conformity with law. The law requires, for the purpose of meeting a charge against

[1] *Brooklyn vs. Insurance Co.*, 99 U. S. Reports, 362.

[2] *Lower vs. U. S. ex rel.*, 91 U. S. Reports, 536.

the town, that the board of auditors and clerk should duly proceed in the manner pointed out by the statute to cause the property of the town to be assessed for its payment.[1]

The two facts which must be considered as established by the pleadings in this case, and by the evidence, are, that these judgments were recovered as stated in the petition; that they have not been paid either in whole or in part, and that no steps have been taken by the proper authorities of the town to cause their payment by the imposition of a tax upon the property of the town. One of the judgments was rendered more than five years since, one more than two years, and the others during the last year. Although it was the duty of defendants or the board of auditors and the clerk under the law to adopt measures long ago to cause the payment of these judgments, rendered in March, 1876, in June, 1879, and in March, 1880, yet nothing has been done, and the only serious question, as I view the subject, is, whether it was necessary that a demand should be made in form by the relator upon the authorities of the town, for their payment, or to proceed in the manner pointed out in the law to cause payment of the judgments. And I think it was not. These judgments were all recovered after due service of process upon the authorities of the town, and after ample opportunity for defense. One of them involving, as I understand, the principle of all the cases, was finally decided by the Supreme Court of the United States, adversely to the defense set up by the town.

It must be presumed, therefore, that these defendants knew of the existence of these various judgments, and that it was their duty to proceed in conformity with law, and that they have failed so to do. It would seem, therefore, to be a vain act to demand that they should proceed under the law, when they have done nothing for a series of years. The only con-

[1]Revised Statutes of Illinois, Township Organization, sections 115, 118, 120, 121, 124.

troversy about any of the judgments is as to that rendered in December last. But while it is generally true that a court will not issue a mandamus to compel the performance of an act which it is merely anticipated that the defendant will not perform, still if the defendant has shown by his conduct that he does not intend to perform the act, and that fact is apparent to the court, it would be a work of supererogation to require that a demand should be made for its performance. Here the only effect of issuing the mandamus is, to require the authorities of the town to do what by law they are obliged to do. The board of town auditors and the clerk are each a part of the machinery, so to speak, by which the judgments are to be satisfied. The clerk is himself a member of the board of auditors. And therefore, it seems to me to be proper and reasonable, and nothing more than the relator has a right to claim of the court, that an order should be issued requiring them to do what the law says, in such a case as this, they must do.

According to my view of the case there is really no material fact upon which it would be necessary to take the verdict of a jury. The judgment of this court must therefore be for the relator, both on the answer of the board of auditors and the demurrer of the clerk.

The writ will accordingly be directed to issue.

S. L. SHELDON *et al.* vs. KEOKUK NORTHERN LINE PACKET COMPANY *et al.*

CIRCUIT COURT—WESTERN DISTRICT OF WISCONSIN—AUGUST, 1881.

IN EQUITY.

1. BILLS IN EQUITY—MULTIFARIOUSNESS.—Whether or not a bill in equity is objectionable on the ground of multifariousness, depends upon the particular circumstances of each case.

2. JOINDER OF CAUSES OF ACTION IN ONE SUIT.—As a general rule, the court will not compel parties to incur the expense, vexation and delay of several suits, where the transactions constituting the subject of the litigation, or out of which the litigation arises, are so connected by their circumstances as to render it proper and convenient that they should be examined in the same suit, and full relief given by one comprehensive decree.

3. JOINDER OF COMPLAINANTS IN CREDITOR'S BILL.—Two separate judgment creditors may unite in a creditor's bill to reach property fraudulently conveyed away by their common debtor.

4. JOINDER OF DEFENDANTS.—Where a creditor's bill charges that the judgment debtor by fraud and collusion has disposed of separate portions of his property to different persons in execution of a scheme to strip the debtor of all his property which could be levied upon, it is proper to join all the grantees as defendants in one bill.

5. LACHES—STATUTE OF LIMITATIONS—DEMURRER.—If the doctrine of *laches* can ever be applied in a suit in equity, as to the bringing of which there is a statute of limitations, a demurrer insisting upon a lapse of time short of the statutory period will not be sustained unless the bill upon its face, without resorting to inferences, makes a clear case of unreasonable delay.

6. The defense of the statute of limitations may be taken advantage of on demurrer to a bill in equity.

7. ALLEGATION OF FRAUD—DEMURRER OF STATUTE OF LIMITATIONS.—It will not be inferred, in support of a demurrer setting up the statute of limitations, from the fact that the alleged fraud occurred more than

This opinion was prepared for publication from a letter addressed by Mr. Justice Harlan, to counsel in the case.—[REPORTER.

six years prior to the institution of the suit, that the complainants discovered the fraud more than six years prior to its commencement.

This was a creditor's bill filed by complainants against the Keokuk Northern Line Packet Company, the Northwestern Union Packet Company, and Peyton S. Davidson, defendants, to reach certain property held by the Keokuk Northern Line Packet Company and certain other property held by Peyton S. Davidson, and to apply the same in satisfaction of judgments obtained by the complainants, separately, against the Northwestern Union Packet Company in 1873 and 1874.

The bill charged that in March, 1873, the Northwestern Union Packet Company made a fraudulent transfer of all its steamboats, barges, and other personal effects to the Keokuk Northern Line Packet Company, and also about April 1, 1873, a fraudulent conveyance of certain lots and real estate, situate at La Crosse, to Peyton S. Davidson; all of which property the complainants claimed ought in equity to be applied in satisfaction of their judgments.

Demurrer to the bill of complaint.

S. U. Pinney and *F. J. Lamb*, for complainants.

Sloan, Stevens & Morris and *J. H. Davidson*, for defendants.

HARLAN, J.—The defendants demur upon these grounds:

First, that the bill is multifarious, in that it seeks to enforce independent judgments in which the complainants have no joint interest, and also because it unites with the cause of action against the Keokuk Northern Line Packet Company, in which the defendant Davidson has no interest, a cause of action against Davidson in which his co-defendant has no interest; *second*, that if complainants ever had any cause of action against the defendants, or either of them, the delay which occurred without suit was so unreasonable as to

deprive them of any right to relief in equity; *third*, that the suit is barred by the statute of limitations of Wisconsin.

The objection of multifariousness will be first considered. Passing by many details of the transactions set out in the bill, it is sufficient now to say that the suit proceeds upon these general grounds:

That the complainants are judgment creditors (with returns of no property found) of the Northwestern Union Packet Company, an insolvent corporation, organized for the purpose of engaging in the business of transporting persons and property; that the property of the common debtor was all withdrawn from their reach through a transfer thereof made to the defendants, the Keokuk Northern Line Packet Company and Peyton S. Davidson, in pursuance of a plan or scheme to which they and the debtor were parties, though in different degrees, and, in some respects, by different acts; and that such plan or scheme was devised or carried out by the parties thereto, with the intent to hinder, delay and defraud the complainants and other creditors of the Northwestern Union Packet Company.

The relief sought is a decree adjudging such transfer to have been fraudulent and void as to the complainants, and other then existing creditors of the Northwestern Union Packet Company, and subjecting to pay the demands of complainants and other creditors who may come into this suit, such of the property, so transferred, as may still be in the possession of defendants; and also requiring the Keokuk Northern Line Packet Company to account for the earnings received from that portion transferred, or which has been lost, destroyed, or used up since the transfers were made.

It has been held by the Supreme Court of the United States, to be impracticable to lay down any fixed, unbending rule as to what constitutes multifariousness or misjoinder of causes of

action.[1] The court must necessarily exercise a large, though, of course, a sound legal discretion in allowing the union in the same suit of matters which do not alike or equally affect all the parties. Each case must depend upon its special circumstances, and the necessities which may arise out of the due administration of justice in that case. As a general rule, the court will not subject parties to the expense, vexation, and delay of several suits, where the transactions constituting the subject of the litigation, or out of which the litigation arises, are so connected by their circumstances as to render it proper and convenient that they should be examined in the same suit, and full relief given by one comprehensive decree. A different rule would often prove to be both oppressive and mischievous, and could result in no possible benefit to any litigant, whose object was, not simply to harass his adversary, but to ascertain what were his just legal rights.

Is the bill objectionable because two separate judgment creditors unite in assailing transactions which have resulted, according to the allegation made, in sweeping away from their reach all the tangible property of their common debtor? I think not. Nothing is more common than for several judgment creditors, having exhausted their legal remedies, and having equal right to resort to the property of the same debtor for the satisfaction of their claims, to unite in assailing a fraudulent conveyance or transfer of the debtor's property. "For they all have a common interest in the suit; and, if they succeed, the decree will be equally beneficial to all in proportion to their respective interests."[2]

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[1] *Oliver vs. Piatt*, 3 Howard, 411; *Gaines vs. Chew*, 2 Howard, 619; *Barney vs. Latham*, 103 United States, 215.

[2] Story's Eq. Pl. § 537*a*, 533, 286; *Brinkerhoff vs. Brown*, 6 Johnson's Ch. 139; *Hamlin vs. Wright*, 23 Wisconsin, 494.

It is equally clear, I think, that the bill is not multifarious, and that there is no misjoinder of causes of action, because Davidson and the Keokuk Northern Line Packet Company are united as defendants.

Taking, as we must upon demurrer, all the material allegations of the bill to be true, it appears that the transfers complained of were all made in execution of a plan or scheme to strip the Northwestern Union Packet Company of all of its tangible property, so that creditors, some of whom were then pressing their claims by suit, could not reach it by the ordinary process of law. These two defendants are, in effect, charged with having confederated with the managers of the Northwestern Union Packet Company, to carry out the fraud, to the injury of the creditors of the insolvent corporation; with having conspired—one, perhaps, by more distinct and numerous acts than the other—with the corporation to hinder, delay, and defraud its creditors; with being in the possession of the fruits of a fraudulent scheme in the execution of which, they were active participants. They are, consequently, upon the theory of the suit, interested in defeating the complainants upon the issue, sharply defined, that the property demanded by complainants was disposed of in pursuance of a fraudulent scheme, in the execution of which they gave active aid. The relations which, according to the bill, the defendant Davidson held to all the property transferred, as well as to the various corporations which at different times controlled its use, were of such a character as to preclude the possibility (the allegations of the bill being sustained) of upholding the conveyance to him, if the transfers to the Keokuk Northern Line Packet Company be adjudged fraudulent and void. It cannot be that the established rules of equity practice would, under these circumstances, compel complainants to institute separate suits against the present defendants.

A leading authority upon this subject is *Brinkerhoff*

vs. Brown, 6 Johnson's Ch. 139. That suit was by several complainants holding distinct judgments against an insolvent corporation. There were several defendants, all of whom were sought to be held liable, in different proportions and in different characters, upon the general ground that the property of the corporation had been withdrawn from the reach of complainants by the fraudulent acts of the several defendants. After analyzing the bill, Chancellor Kent said, page 153: "It thus appears from the bill that all the defendants were not jointly concerned in every injurious act charged. There was a series of acts on the part of the persons concerned in the company, all produced by the same fraudulent intent, and terminating in the deception and injury of the plaintiffs. The defendants performed different parts in the same drama, but it was still one piece,—one entire performance, marked by different scenes; and the question now occurs whether the several matters charged are so distinct and unconnected as to render the joining of them in one bill a ground of demurrer."

After reviewing the authorities, he remarks, page 156: That the principle to be deduced from them is that "a bill against several persons must relate to matters of the same nature, and having a connection with each other, and in which all the defendants are more or less concerned, though their rights in respect to the general subject of the case may be distinct."

Again he remarked: "When we consider that the plaintiffs * * * are judgment creditors, having claims against the Genesee Company perfectly established, and not the subject of litigation in this suit, and that the general right claimed by the bill is a due application of the capital of that company to the payment of their judgments; that the subject of the bill and of the relief, and the only matter in litigation is, the fraud charged in the creation, management, and disposition of that capital, and in which charge all the defendants

are implicated, though in different degrees and proportions, —I think we may safely conclude that this case falls within the reach of that principle, and that the demurrer cannot be sustained."

The case is cited with approval in Story's Eq. Pl. § 286, where it is said—

"The same principle has been supposed properly to justify the joining of several judgment creditors in one bill against their common debtor, and his grantees, to remove impediments to their remedy created by the fraud of their debtor in conveying his property to several grantees, although they take by separate conveyances, and no joint fraud in any one transaction is charged against them all."

To the same effect speaks the Supreme Court of Wisconsin in *Hamlin vs. Wright*, 23 Wisconsin, 494, where it is said that—"The fact that all the grantees have become accessory to the fraudulent attempt of the debtor to place his property beyond his creditors' reach, gives them such a common connection with the subject-matter of the suit, that they may be joined, although the purchase of each was distinct from the others, and each is charged only with participating in the fraud in respect to his own purchase. * * * There was, therefore, no misjoinder of causes of action in uniting the different fraudulent grantees of the debtor's property as defendants, although they purchased at different times, and each is charged only with fraud in his own purchase."

See, also, Story's Eq. Pl. (9th Ed.) §§ 271–280, § 530–540; Adams Eq. (6th Am. Ed. by Sharswood,) 617, note 2; *Blake vs. Van Tilborg*, 21 Wisconsin, 680; *Bassett vs. Warner*, 23 Wisconsin, 673.

As to the second point raised by the demurrer, that complainants, independent of any statutory limitations, have lost their right to relief by delay in suing, I do not think it well taken. The authorities cited under this head by counsel for

defendants apply to suits not strictly within any statute of limitations. The Legislature here has declared that actions for relief on the ground of fraud, in cases heretofore solely cognizable by the court of chancery, "may be commenced within six years after the discovery of the facts constituting the fraud." Administering that law in this suit, I do not think relief should be denied even if it appeared that the complainants might have applied for relief at an earlier date, when the frauds complained of were first discovered. The court should not assume or infer unreasonable delay, after such discovery, from the isolated fact that the fraud charged was committed several years before the commencement of the suit. It is consistent with the bill that the fraud, and the facts constituting it were not discovered until some time time after its commission. If the doctrine of laches or lapse of time can ever be applied in a suit as to which there is a statute of limitations prescribing the period within which such suit may be commenced, a demurrer, insisting upon lapse of time short of the statutory period, should not be sustained, unless the bill upon its face, without resorting to inferences, makes a clear case of unreasonable delay, after the discovery of the fraud charged.

This brings me to the question of the statute of limitations. In considering this question I have carefully examined the several revisions of the Statutes of Wisconsin as well as those of New York, to which counsel refer. I have also read the decisions of the New York court to which complainants refer. My best judgment is that the ten-year limitation has no application for the reason that suits like this are "provided for" in the previous section, which prescribes a limitation of six years where relief is sought on the ground of fraud in a case theretofore "solely cognizable by the court of chancery." The contrary view is maintained by counsel upon the authority mainly of *Corning vs. Stebbins*, 1 Barbour's Ch.

589; *Lawrence vs. Trustees*, 2 Denio, 577; and *Spoor vs. Wells*, 3 Barbour's Ch. 199. The first of those cases was a suit by a receiver appointed upon a creditor's bill after the return of an execution unsatisfied. The object of the suit was to reach the equitable interests and things in action of the defendant. The chancellor said: "And I know of no limitation of that right, short of the ten years which the statute has fixed, within which suits purely of equitable cognizance must be brought in this court." When (1846) that case was decided, the limitation prescribed by the statutes of New York and Wisconsin were, as to suits in equity, the same. It was true, in 1846, of the Wisconsin statutes, that there was no provision expressly fixing a period for the commencement of suits "purely of equitable cognizance," and therefore such cases were then held as in the New York courts, to be embraced by the ten-year limitation, which was the period prescribed for "all other cases not herein provided for." But the ten-year limitation did not, after the Wisconsin Revision of 1858, apply to suits "purely of equitable cognizance," because such suits, wherever relief is sought on the ground of fraud, were provided for in a previous section, subjecting them to the six-year limitation. The Wisconsin Revision of 1849 provided that the limitation applicable in suits at law should govern in cases of which equity courts had concurrent jurisdiction with the courts of law, and should not apply in suits of which a court of equity had "peculiar and exclusive jurisdiction;" also that "bills for relief on the ground of fraud shall be filed within six years after the discovery, by the aggrieved party, of the facts constituting such fraud, and not after that time." The Revision of 1858, as it seems to me, either for the purpose of providing a uniform limitation in all actions "for relief on the ground of fraud," or to reduce the limitations in suits purely of equitable cognizance, expressly declares that the six-year limitation shall apply to actions for relief on

the ground of fraud "in cases which were heretofore solely cognizable by the court of chancery"—the cause of action to be deemed as accruing upon the discovery of the fraud. In respect to such suits there is, it seems to me, a manifest difference between the Revision of 1858 and the law previous to that date. What I have said about the cause of *Corning vs. Stebbins* seems to be applicable to the cases in 2 Denio and 3 Barbour's Ch. *supra*. Assuming, then, that the present suit must have been commenced within six years after the discovery of the facts constituting the fraud charged, the important inquiry is whether it appears, from the face of the bill, to be barred. Many courts have held that such a defense could not be made by demurrer. But the doctrine is now settled otherwise. Story Eq. Pl. (9th Ed. by Gould,) § 484, note 1, and § 503. That this objection may be made by demurrer is the doctrine of the Wisconsin Supreme Court, notwithstanding its statutes (1858) declare that "the objection that the action was not commenced within the time limited can only be taken by answer." *Howell vs. Howell*, 15 Wisconsin, 59; *Hyde vs. Supervisors*, 43 Wisconsin, 135.

The present action was commenced June 3, 1879, and counsel for defendant contends that the cause of action must be deemed to have accrued April 1, 1873, "on or about" which time, the bill states, not only the property agreed to be contributed by the Northwestern Union Packet Company to the Keokuk Northern Line Packet Company was delivered into the custody of the latter corporation, but the pretended sale of real estate to Davidson occurred. But the bill also shows that the agreement with the packet company contemplated an appraisement of the property to be transferred to it, and that it should be paid for in the stock of the new company, upon the basis of such appraisement. The bill further shows that the appraisement did not, in fact, take place until July, 1873; that the several bills of sale, from the Northwestern Union Packet

Company to the Keokuk Northern Line Packet Company, were executed on divers days between March 31 and October 31, 1873. How many such bills of sale were executed before, and how many after, June 3, 1873, is not stated. The bill also shows that the stock was not delivered to the vendor corporation until some time in the year 1874. It is also alleged that the conveyance of real estate to the defendant P. S. Davidson was not executed until August 19, 1873. Certainly, the transaction by which defendant Davidson secured the title to the real estate in La Crosse was not consummated until that conveyance was made. And it does not distinctly appear that the sales to the Keokuk Northern Line Packet Company became irrevocable or were consummated prior to June 3, 1873. An instructive case upon this point is *Muir vs. The Trustees, etc.*, 3 Barbour's Ch. 481, where Chancellor Walworth said:

"It may be proper to say, however, that although it is alleged in the bill that the executors of Leake obtained possession of his property, etc., in or about the year 1830, it does not distinctly appear that it was more than ten years before the filing of the complainant's bill. And to enable a defendant to take advantage of the statute of limitations upon demurrer, it must distinctly appear, by the bill itself, that the complainant's remedy is barred by lapse of time."

Aside, however, from this view, I am of opinion that it does not, in the sense of the authorities, appear on the face of the bill that the suit is barred by the limitation of six years, unless it be true, which cannot be conceded, that the failure of complainants to allege that the frauds complained of were discovered within six years before suit, is as fatal to their suit as if they had admitted, on the face of the bill, in terms, that the frauds were discovered more than six years before the commencement of the suit. This proposition rests, I suppose, upon the general statement in some of the books

that demurrer will lie where the bill shows, upon its face, that the suit is barred. The cases cited in the books, in support of the general rule, show that defendants' counsel misinterpreted the rule. For instance, in *Hoare vs. Peck*, 6 Simons, 51, it appeared on the face of the bill, not only when the fraud occurred, but when it was discovered by complainants. So in *Hovenden vs. Lord Annesley*, 2 Schoales & Lefroy, 636, it appeared, upon the face of the bill, that the fraud was discovered nearly sixty years before suit. So in *Foster vs. Hodgson*, 19 Vesey, 182, it appeared on the bill that the fraud charged had occurred twelve years after the complainant might have discovered it, with very slight diligence.

Since the statute declares that the cause of action shall not be deemed to have accrued until the discovery of the facts constituting the fraud charged, and since the utmost which defendants can claim is that the bill shows the fraud to have been committed more than six years before the commencement of the suit, it cannot be said to be apparent from the bill that six years passed after the fraud was discovered—that is, after the right of action accrued—before suit. A demurrer, therefore, does not meet the objection here urged. And such is the construction of a somewhat similar statutory provision by the courts of New York. In *Radcliff vs. Rowley*, 2 Barbour's Ch. 32, the court gave a construction to the provision which declares that "bills for relief, on the ground of fraud, shall be filed within six years after the discovery, by the aggrieved party, of the facts constituting such fraud, and not after that time." Chancellor Walworth said:

"But it does not appear on the face of the bill when W. Radcliff discovered the alleged fraud, or that he ever did discover the fact, now stated by the heirs, that the judgments had been paid by Rowley, as the agent of the judgment debtor, with funds in his hands belonging to the latter, before the sheriff's sale. * * * And I think, upon a proper

construction of the statute, it is not necessary that the complainant should allege in his bill that he has discovered the fraud complained of within six years. A demurrer, therefore, will not lie, to a bill for relief on the ground of fraud, although it appears that the fraud occurred more than six years before the commencement of the suit; unless it also appears positively, or by necessary intendment, that the fraud was discovered by the party aggrieved more than six years before he filed his bill for relief. Where that does not appear, the defendant must be left to make his defense by plea or answer, so as to present an affirmative issue upon the question of the discovery of the fraud."

The position thus taken by the New York court I regard as sound.

What has been said necessarily leads to the conclusion that the court will not, in support of a demurrer setting up the statute of limitations, infer from the fact that the alleged fraud occurred more than six years prior to the institution of the suit, that the complainants discovered the facts constituting the fraud more than six years before suit was commenced.

For the reasons given, an order will be entered overruling the demurrer, and giving the defendants thirty days within which to plead or answer.

UNITED STATES vs. WILLIAM H. DOWDELL.

DISTRICT COURT—DISTRICT OF INDIANA—OCTOBER, 1881.

PENSION LAW—INDICTMENT—ILLEGAL FEES—Section 5485, U. S. Revised Statutes, provides a penalty for any person receiving a greater compensation for obtaining a pension, "than is provided in the Title pertaining to pensions" under that title (Sec. 4785) the Commissioner of Pensions was authorized to allow a fee of not exceeding $25, for prosecuting a claim. By act of June 20, 1878, section 4785 was repealed and the reception of a greater sum than $10, for procuring a pension made unlawful: *Held*, that the provisions of section 5485, relating to the offense of charging illegal fees, obtain and apply to violations of the act of June 20, 1878.

Indictment under section 5485 U. S. Revised Statutes, for charging illegal fees for prosecuting a pension claim.

Motion to quash.

Charles L. Holstein, United States District Attorney, and *Charles H. McCarer*, for United States.

Harris & Calkins, for defendant.

GRESHAM, J.—The charge is that on the 1st day of January, 1880, the defendant demanded and received from Keziah A. Davis for prosecuting her claim for a pension, a greater sum than was allowed by law. The indictment is based upon section 5485 of the Revised Statutes, which reads:

"Section 5485. Any agent or attorney, or any other person instrumental in prosecuting any claim for pension or bounty land, who shall directly or indirectly contract for, demand or receive or retain any greater compensation for his services, or instrumentality in prosecuting a claim for pension

or bounty land than is provided in the Title pertaining to pensions, or who shall wrongfully withhold from a pensioner or claimant the whole or any part of the pension or claim allowed and due such pensioner or claimant, or the land-warrant issued to any such claimant, shall be deemed guilty of a high misdemeanor." * * *

Section 4785 declares that no agent, attorney or other person shall demand or receive any other compensation for his services in prosecuting a claim for a pension or bounty than such as the Commissioner of Pensions shall direct to be paid, not exceeding $25.

The act of June 20, 1878,[1] declares that it shall be unlawful for any agent, attorney or other person, to receive for his services in a pension case a greater sum than $10, and expressly repeals section 4785.

It is declared in section 5485 that no greater compensation shall be retained or received for prosecuting a claim for pension "than is provided in the Title pertaining to pensions," and the defendant moves to quash the indictment on the ground that the only compensation which is found in the Title pertaining to pensions is that in section 4785, which has been repealed, and that it is no longer a criminal offense to demand or receive illegal fees for prosecuting pension claims.

Section 4785 simply authorized the Commissioner of Pensions to allow a fee of not exceeding $25 for prosecuting a claim.

Not satisfied with this provision for the protection of pensions Congress, by the act of 1878, declared that it should be unlawful for any agent or attorney to charge for his services in a single case more than $10, and repealed section 4785. It can hardly be doubted that it was the design of this statute to protect pensioners rather than claim agents and attorneys,

[1] United States Statutes, Session of 45th Congress, page 243.

and to give effect to this design the statute must be enforced as a substitute for section 4785. Why did Congress by this act declare that it should be unlawful for the agent or attorney to demand or receive more than $10 for his services in any one case, and affix no penalty for its violation? Clearly, I think, because it was understood that the punishment provided in section 5485 was in force and applicable. If it had been the intention of Congress, while thus legislating in the interest of pensioners, to relieve agents and attorneys from criminal liability for demanding or receiving compensation in violation of law, that intention would have been manifested by an express repeal of section 5485, or that portion of it which prescribed punishment for demanding or receiving fees in violation of law, as well as section 4785.

It is true that Section 5485 declares that the agent or attorney shall not demand or receive a greater compensation "than is provided in the Title pertaining to pensions;" but the fair meaning of that is, I think, that no greater compensation shall be demanded or received than is provided by law.

In the general appropriation act approved March 3, 1881, the following was inserted: "And the provisions of Section 5485 of the Revised Statutes shall be applicable to any person who shall violate the provisions of the act entitled 'An act relating to claim agents and attorneys in pension cases,' approved June 20, 1878." After the passage of the act of 1878 conflicting views were entertained as to whether there was any penalty for demanding or receiving any compensation in violation of law for prosecuting pension claims, and the clause just quoted was inserted in the appropriation act to remove that uncertainty.

I am aware that the learned Circuit Judge of the Sixth Circuit, for whose judgment I have great respect, has held in the case of the *United States vs. Mason*, reported in the

Federal Reporter (vol. 8, p. 412), that the repeal of section 4785 relieved claim agents and attorneys from criminal liability for demanding and receiving illegal fees. I have been slow to differ from a judge of such known ability, but after careful consideration my mind leads me to a different conclusion.

Motion to quash overruled.

PETER ROESNER, Administrator, etc. vs. HENRY HERMANN.

Circuit Court—District of Indiana—October, 1881.

Employer and Employé—Contracts against Liability for Negligence are Void.—A contract between an employer and employé, by which the employé, in consideration of his employment, releases and discharges his employer from all liability for damages for injury or death of the employé, resulting from the negligence of his employer is void as against public policy.

This was an action by the plaintiff as administrator of the estate of George Reed, against the defendant, to recover damages for the death of Reed, which was claimed to have resulted from the negligent use of defective and unsafe machinery by the defendant. The substance of the complaint was that the defendant's machinery was defective and unsafe; that while operating the same with reasonable care, and without knowledge of its defective character, the deceased received the injuries which caused his death; and that the defendant knew of the character of the machinery, or with proper dili-

gence might have known it. The defendant pleaded his release and discharge from all liability for damages by virtue of a written agreement made with the said Reed, by which Reed in consideration of his employment by the defendant, released and discharged the defendant from any and all liability for injury or death occuring while in his employment.

Demurrer by plaintiff.

Charles Denby and *J. S. Buchanan*, for plaintiff.

Charles L. Wedding and *James L. Shackelford*, for defendant.

GRESHAM, J. (*orally.*)—So far as he could do so by the exercise of reasonable care, the defendant was bound to supply his factory with suitable and safe machinery. If he failed to do this and required his employé to operate machinery which was unsound and unsafe, and in doing so, the latter while exercising ordinary care and prudence, received injuries which caused his death, his personal representative has a right of action for the benefit of those who have sustained loss by the injury and death. When the employer's negligence in supplying his employé with unsafe machinery has caused the death of the latter, the law will not allow the employer to say, as in effect he does in this answer: "It is true that my machinery was defective and unsafe, and my negligence caused the death of my employé, but I am not liable to those who have suffered from the loss of his life, because I had a contract with him which secured to me the right to supply him with unsafe and defective machinery, and to be negligent." Such a contract is void as against public policy. If there was no negligence the defendant needed no contract to exempt him from liability; if he was negligent, the contract set out in his answer is of no avail.

Demurrer sustained.

THOMAS HOPPER vs. TOWN OF COVINGTON.

CIRCUIT COURT—DISTRICT OF INDIANA—OCTOBER, 1881.

1. MUNICIPAL BONDS—RECITALS—VALIDITY—BONA FIDE HOLDERS.—Municipal bonds which contain no recitals showing that they are issued in pursuance of legislative authority, and in the manner prescribed by it, are not unimpeachable in the hands of *bona fide* holders. Such bonds are not commercial paper.

2. NECESSARY ALLEGATIONS IN COMPLAINT.—In an action on municipal bonds the plaintiff must show in his complaint, either that the bonds contain such recitals as would preclude the municipality from impeaching their validity, or else that they were issued in substantial compliance with the law authorizing them, and for a proper purpose.

McDonald & Butler, for plaintiff.

Thomas F. Davidson, for defendant.

GRESHAM, J.—This is an action on interest coupons, alike except in number, one of which reads as follows:

"$8. COVINGTON, Ind., October 1, 1876. One year after date the Town of Covington will pay to the bearer, in the city of New York, eight dollars, being one year's interest on bond No. 14.

"A. GEST, President.

"Attest: FRANK M. HICKS, Clerk."

It is alleged in the complaint that the town of Covington executed certain bonds to which the coupons in suit had been attached. Copies of the bonds are not filed with the complaint; there is no allegation as to their tenor and effect, the purpose of their issue, or the authority for it. To this complaint a demurrer is interposed, which presents the question under consideration.

Power is given by a statute of Indiana (1 Davis, 343), under specified conditions to cities and towns to issue bonds

not exceeding $50,000, payable in not less than one nor more than twenty years, to provide means for school purposes. And in section 27 of another statute (1 Davis, 881), it is declared that towns shall not have power to borrow money, or incur any debt or liability except upon the petition of the citizen owners of five-eighths of the taxable property.

It is insisted in support of the demurrer, that the power to issue negotiable bonds is not inherent in a municipal corporation; that if it exists in a given case, it must be exercised in the mode and for the purpose prescribed in the act conferring the authority, and that in an action upon the bonds of a municipal corporation, containing no recitals, the declaration must show authority to issue the bonds sued on, and its exercise in the mode and upon the conditions prescribed by law.

In support of the complaint, it is contended that municipal corporations in Indiana have power to issue commercial paper for some purposes; that public officers are presumed to act in accordance with, and not contrary to the law, and that the plaintiff had a right to buy the coupons as commercial paper, without inquiry, presuming they were issued for a proper purpose, and under authority of the statutes just mentioned.

Municipal corporations are created to secure to the people residing within their jurisdiction the benefits of local government, and not for business purposes. Unlike trading or business corporations, their powers are governmental and administrative. In addition to the power to raise revenue by taxation, and other express powers conferred upon them by their charters, they may exercise such incidental powers as are necessary to enable them to accomplish the object of their being. The power to make contracts and expenditures carries with it the implied power to incur indebtedness, and to issue proper obligations therefor. But it does not follow that, because municipal corporations, in the exercise of their legiti-

mate and ordinary jurisdiction, may incur indebtedness and issue vouchers, orders, or other instruments for the same, they may issue commercial securities, payment of which will be enforced against the taxpayers, in favor of bona fide holders, however irregular or fraudulent the issue may be.

The court, in *Mayor vs. Ray*, 19 Wallace, 477, say: "If in the exercise of their important trusts the power to borrow money and to issue bonds or other commercial securities is needed, the legislature can easily confer it under the proper limitations and restraints, and with proper provisions for future repayment. Without such authority it cannot be legally exercised." "No such power ought to exist, and, in our opinion no such power does legally exist, unless conferred by legislative enactment, either express or clearly implied."

While concurring in the judgment of the court, but dissenting from some of the grounds upon which it was based, Justice Hunt said that in his opinion a municipal corporation might borrow money for legitimate uses and issue its commercial paper for the same, unless expressly prohibited by its charter or by some statute from so doing.[1]

But while municipal corporations cannot borrow money or issue commercial securities without legislative authority, express or clearly implied, it is nevertheless the law in the Federal Courts, that when a municipality or its officers are invested with authority to issue bonds, and to decide whether the conditions exist under which a special enactment authorizes the issue of such securities, and such officers issue bonds reciting the existence of the necessary conditions, the recital is itself a decision by the appointed tribunal, which is conclusive in favor of a bona fide purchaser.[2]

In *Buchanan vs. City of Litchfield*, 12 Otto, 278, the city

[1] *Police Jury vs. Britton*, 15 Wallace, 566; *Hitchcock vs. Galveston*, 2 Woods, 272; *Chisholm vs. City of Montgomery*, 2 Woods, 584.

[2] *Coloma vs. Evans*, 2 Otto, 484.

issued its water bonds, amounting to $50,000, to aid in constructing and maintaing a system of water works. The bonds recited that they were issued under and in pursuance of a particular act of the legislature and a city ordinance, which authorized the issue, and the plaintiff was a bona fide holder. The court held that the bonds were void, because they created an indebtedness in excess of the amount to which the municipality was restricted by the State Constitution. "As, therefore," says Mr. Justice Harlan, in delivering the opinion of the court, "neither the Constitution nor the statute prescribed any rule or test by which persons contracting with municipal corporations should ascertain the extent of their existing indebtedness," it would seem that, if the bonds in question had contained recitals which, upon any fair construction, amounted to a representation upon the part of the constituted authorities of the city that the requirements of the Constitution were met—that is, that the city's indebtedness, increased by the amount of the bonds in question, was within the constitutional limit,—then the city, under the decisions of the court, might have been estopped from disputing the truth of such representations as against a *bona fide* holder of its bonds." * * * "The present action cannot be maintained unless we should hold that the mere fact that the bonds were issued without any recital of the circumstances bringing them within the limits fixed by the Constitution, was in itself conclusive proof in favor of a bona fide holder, that the circumstances existed which authorized them to be issued. We cannot so hold."

This case clearly supports the doctrine that municipal bonds which contain no recitals are not unimpeachable in the hands of bona fide holders for value—that is to say, they are not commercial paper.

It is not claimed that the town of Covington had any general or incidental power to issue bonds or other commercial

paper, but it is asserted for the plaintiff that when a municipality has express authority, as in this case, to issue bonds for one purpose, it may issue its securities with or without recitals and it will be conclusively presumed in favor of purchasers for value without notice, that the issue was authorized. It would follow, if this be true, that when express authority exists for the issue of municipal bonds for one purpose, bonds which are issued without recitals for an unauthorized and fraudulent purpose will be enforced against the taxpayers, in favor of purchasers, for value, without notice; and that an act conferring authority upon municipalities to issue bonds, under clearly defined conditions and restraints, for a particular purpose, confers authority, as between the municipality and bona fide third parties, to issue commercial securities for all purposes.

The cases of *Gelpcke vs. City of Dubuque*, 1 Wallace, 203; *Supervisors vs. Schenck*, 5 Wallace, 772; *City of Lexington vs. Butler*, 14 Wallace, 296; and *San Antonio vs. Mehaffy*, 6 Otto, 314, are cited as showing that when a corporation has power under any circumstances to issue negotiable securities, it may be assumed that the securities offered have been issued for an authorized purpose, and that when a municipality issues bonds without recitals, there being authority for an issue for a specified purpose, such bonds are no more liable to be impeached in the hands of such a holder than any other commercial paper, and that recitals are not necessary to estop the municipality. In three of these cases there was express authority to issue the bonds sued on, and they contained recitals showing that the proper officers had decided the precedent conditions existed upon which the power depended; while in the other—*Supervisors vs. Schenck*—although it does not expressly appear that the bonds sued on contained recitals, that is the fair inference, for the court say it is settled law that a negotiable security of a corporation, which on its

face appears to have been duly issued, is valid in the hands of a bona fide holder.

It is further urged for the plaintiff that, even if the bonds and coupons mentioned in the complaint are impeachable in the hands of the plaintiff, the question before the court is one of pleading, and it devolves upon the defendant to show that the bonds were issued without authority. The coupons contain no recitals, and there is no allegation in the complaint that the bonds do. The argument of counsel on both sides assumes that there are no recitals in the bonds. The plaintiff was bound to know that the bonds were issued under express legislative authority for school purposes, and it was his duty to inquire whether the conditions existed that authorized them to be issued. Power to issue commercial paper was the exception and not the rule, and in the absence of such recitals as would preclude the municipality from impeaching the bonds in the hands of a bona fide holder, the plaintiff has no right of action, unless he shows in his complaint that the bonds were issued in substantial compliance with the legislative enactments and for a proper purpose. Bonds which are not issued in pursuance of express legislative authority, and in the mode prescribed by it, possess none of the qualities of commercial paper. The Legislature was careful, in conferring power on municipalities to borrow money and issue bonds for school purposes, to prescribe the mode and manner of its execution, thereby making the mode of its execution the measure of the power granted.[1]

Demurrer sustained.

[1] *Anthony vs. County of Jasper*, 11 Otto, 697.

NELSON J. BLATHERWICK vs. EDWARD CAREY *et al.*

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—OCTOBER, 1881.

IN EQUITY.

1. PATENTS—HORSE-SHOES.—The Blatherwick patent, No. 170,809, for an improvement in horse-shoes, for the purpose of preventing interfering, must be limited in its application to the particular kind of shoe described, and cannot be extended to include all shoes where the toe-calk or tumbling point is changed to a point inside the natural line when placed on the hoof.

2. LICENSE—INFRINGEMENT—ESTOPPEL.—The fact that the defendants at one time held a license from the complainant will not afterwards estop them from denying infringement although manufacturing the same article as before.

Merriam & Whipple, for complainant.

W. B. Cunningham and *West & Bond*, for defendants.

BLODGETT, J.—This is a Bill for infringement of patent No. 170,809, granted to Nelson J. Blatherwick, the complainant, under date of December 7th, 1875, for an "improvement in horse-shoes," and reaching back by *caveat* to October 21st, 1874.

The object of the invention is declared in his specification to be the construction of a shoe to prevent horses from interfering, and this is said to be obtained "by making the shoe broader and fuller upon the inside than upon the outside, enlarging it at the toe and upon the inside, thus increasing the support for the horse at that point, the effect of which is that in traveling this point is the last to leave the ground,

and the tendency is to throw the ankle of the horse outward and away from the opposite leg, instead of inward and toward it, and when the foot leaves the ground it follows this position of the ankle, and is thrown away from rather than toward the opposite leg. When the ankle is in this position the opposite hoof can pass without interfering."

The drawing, figure 1, shows the inside fore-quarter of the shoe carried forward so as to project beyond the wall of the hoof to such an extent that the projection beyond the hoof would be at least three-fourths of an inch in an average full sized shoe, and the outside periphery or rim of the shoe, is carried back from the point of the projection nearly in a straight line to the beginning of the hind quarter; that is, to the point where the hoof begins to curve in toward the heel, and when a toe-calk is used it is to be located upon the corner or angle thus projected from the inner fore-quarter; that is, it is to be located considerably to one side of the shoe, and coming to, or nearly to, the outer edge thereof.

In other words, the apparent purpose of this device is to practically change the location of the horse's toe from the point of the hoof to this projection inside of the natural toe or forward point of the hoof.

The object of the device and its mode of operation is quite clearly described by Mr. Powers, the complainant's expert, who says: "the patent shoe is carried forward on its inner side in nearly a straight line to and even with the front of the foot, and this forward extension, when the foot tips forward upon the toe in the act of moving, continues the longest in contact with the ground, or leaves the ground last. The effect of this construction and motion is to cause the foot, in forward progress, to swing or tumble upon this extended point outward, and to a certain extent, removing the passing foot and leg of the horse, thus preventing the moving foot from hitting the opposite stationary one. Each opposite foot

being provided with one of these shoes, in turn tumbles out on this point of the shoe, and thus escapes the other, or does not interfere."

The only questions made in the defense which I deem it necessary to consider, are:

1st. The construction to be given this patent, and,

2nd. Whether the defendants infringe.

The proof shows, and it was admitted on the argument to be true, that horse-shoes, to prevent interfering, had been made and used long prior to the time when Blatherwick claims to have made this invention, where the inner fore-quarter was curved or bent much more sharply than the natural curve of the hoof, and the toe-calk placed upon this sharp curve or angle so that the bearing of the toe was upon this calk nearly in a line with the inside bar of the shoe.

This is clearly shown by the testimony of John Palmer, A. W. Redner, Michael McNurney, John Trainor, Thomas Cody and others. Indeed, it may be taken as a proven and admitted fact in this case, that horse-shoes, for the purpose of preventing interfering, had been made and used before the complainant entered the field, where an attempt, at least, had been made to change the bearing of the toe to a point inside of the natural toe or tip of the hoof. This inventor did more, and made a new or artificial toe inside of the natural one, by carrying the shoe almost at a right angle from the natural toe or point of the hoof to a point nearly as far inward, that is, toward the other foot, as the widest part of the hoof, and extending back from this point to the widest part of the foot, in nearly a straight line, so that the inner fore-quarter of the shoe was nearly a right angle rather than a curve, corresponding to the shape of the foot. The necessary effect of this shape is to make the angle of the shoe, as I have already said, to project beyond the wall of the hoof, and this projection forms the tumbling point, as Mr.

Powers calls it, or point which last leaves the ground in the act of stepping.

In the light of the testimony as to the state of this art at the time Blatherwick made his invention, I have no doubt this projection beyond the wall of the hoof must be deemed the distinctive feature of his patent. And that he evidently intended this should be so, is shown by his drawing, Fig. 1, where the location of the nail head channel is such as clearly demonstrates that the corner or angle would project beyond the wall of the hoof.

With this construction of the complainant's patent, it is quite evident that the defendants do not infringe, for their shoe, the complainant's Exhibit 1, has no projection beyond the wall of the hoof. It seems to me to be in all substantial respects like the shoe made and used by Palmer, Trainor and others, long prior to complainant's invention. It places the toe-calk inside the line of the point of the hoof, and thereby transfers the bearing to some extent from the toe, but it does not project or bear beyond the line of the hoof. The merits, if there are any, in the complainant's invention, consist, in my estimation, according to the evidence as to the state of the art, in this projection beyond the hoof.

It is alleged that the defendants called the form of shoe which they used, the "*Blatherwick shoe*," and it also appears that the defendants at one time held a license from the complainant; but this does not amount to an estoppel on the defendants to deny infringement, and only proves that, for a time at least, the defendants conceded to the complainant the broad claim now insisted on in this case, that the patent covers all shoes where the tumbling point is changed to a point inside the line of the natural toe. This is understood to be the claim of the complainant now as to the effect of his patent, which I have already said I cannot allow. Not being now acting under a license, defendants are not bound by any

implied admission from the fact of having once taken a license.

I, therefore, conclude that the defendants do not by the use of the shoe shown in the proof to have been made by them, infringe complainant's patent, and this bill must be dismissed at complainant's cost.

JAMES S. SHANNON vs. THE J. M. W. JONES STATIONERY COMPANY.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—OCTOBER, 1881.

IN EQUITY.

1. PATENTS—PAPER HOLDERS.—The Smith & Shannon patent for an improvement in paper holders, is valid.
2. The device of defendant, *held*, to be an infringement.

Jesse Cox and *Homer N. Hibbard*, for complainant.

N. C. Gridley, for defendant.

BLODGETT, J.—This is a suit for injunction and damages for an alleged infringement by defendant, of patent No. 211,909, issued July 24, 1879, to Frederick W. Smith and James S. Shannon, and which is now held by complainant, for an "Improvement in Paper Holders."

The defense set up is want of novelty and non-infringement.

The character and scope of the invention is set out by the patentees in their specifications as follows:

"Our invention relates to that class of paper files or temporary binders adapted, by having separable uniting wires, to allow the withdrawal of any one of many papers thereon held, or the insertion of papers between those already on file, without disturbing the order in which the others are placed.

"The object of our invention is to provide a file, more prompt and positive in its action, less calculated to tear the papers filed thereon, more convenient of manipulation, and adapted, in its double form especially, to serve as a writing tablet for the lap or desk.

"It consists in a paper holder with duplex parallel hinged transfer wires, made from one piece; having the fixed wires and movable wires secured to the same connecting plate whereby those parts may be separately packed and attached to any desired base-board; in the structure of the puncturing wire, in a felt or plush covering for the bottom of the base-board, and in the stop to limit the movement of the hinged wires.

"Figure 1 is a perspective view of a double or duplex file applied to a tablet, showing the fixed wires as being tubular, and the movable wires solid. It also shows the movable or transfer wires formed of a single piece of wire bent in its connecting or horizontal position in the shape of a crank and hinged near its angles."

Another feature of the device as described and claimed, is that the fixed and movable wires are attached to a single plate removable from the tablet which allows the parts to be separately packed for transportation.

The leading idea of this device is, the two puncturing spindles, and the transfer wires, so arranged to operate with each other as to form two continuous parallel rings upon

which papers may be held in place, and yet permit the easy opening of the rings for the removal or insertion of a paper without the displacement of the others.

Standards or spindles for holding papers in place, are old, and so, too, was a bent puncturing wire with another wire, so arranged as to form with the puncturing wire a ring on which papers could be transferred from the puncturing wire, and a paper removed or a new one placed on the file within the package. This is shown in the "*Hauxhurst file*," one of defendant's exhibits in the case.

This file lacks many of the elements of convenience and utility which are obviously furnished by the complainant's file. First, it is a hanging file. Second, it has only one wire. Papers cannot be so easily looked over, examined, or removed, or new ones inserted, as in the other file. It also lacks the feature of ready removability of parts so as to admit of close packing for transportation.

Yet this, as well as the "Billow File" and the Buell and Lilley file holder, shown in the proof, must be held to limit the scope of the complainant's device.

But none of the devices antedating the complainant's patent show a practical duplex paper holder with a tablet, and arranged with more than one parallel ring composed of puncturing and transfer wires operating together as shown by complainant's device.

It seems very evident from the proof that these inventors made an improvement in the art to which their device belongs, which, while it may, in some degree, have been suggested, had not been accomplished by any or all of their predecessors; and that this was a substantial and useful improvement is shown by the number of paper holders which have been brought before the public since Smith and Shannon's invention, which in all essential particulars seem to embody their device. The proof shows something over thirty devices,

embodying substantially the Shannon device, which have entered the field since his patent went before the public, showing that the public accepted this form of file binder, or paper holder, as new and useful beyond anything of the kind before produced; and the proof shows that a large demand at once sprung up for complainant's device, which has continued, except so far as it has been impaired by interfering devices.

I therefore conclude that this patent cannot be held void for want of novelty.

Upon the question of infringement there can be no doubt but that defendant's paper holder contains the same essential elements which have made the complainant's holder a success. The puncturing and transfer wires are so arranged as to form parallel rings. The transfer wires are so joined as to be, for all substantial purposes, the same as those of the complainant. Their mode of operation and effect, and their function in the organism, are the same in both devices.

The defendant insists that by the terms of the complainant's patent his transfer wires must be formed of a "single piece of wire," but the connecting bar between defendant's wire makes them for all practical purposes one wire, and I discover nothing in the proof that leads me to conclude that the complainant was, by the state of the art when he entered the field, to be confined to so literal and narrow a construction of his patent as would relieve the defendant from infringement, because its transfer wires are made of two pieces of metal instead of one. If the proof showed that other double transfer wires had been made prior to complainant's patent, which performed substantially the function of the complainant's or defendant's transfer wires, then the point might be well taken. But it seems to be a necessity for the operation of these double transfer wires that they shall be so connected together as that the lifting of one will lift the other to the

same extent in the same direction so as to retain the parallelism of the rings. And this appears to be most readily accomplished by making the two wires in one piece. But that does not allow an infringer to cut out a section of this wire and insert another piece of metal in the place of that cut out, and then insist that it does not infringe, when the metal inserted performs the same function as that removed.

I find, therefore, that defendant's paper holder infringes the first, second, third, fourth and seventh claims of the complainant's patent.

The seventh claim is for a stop. A stop is necessary for the proper working of the device in order to prevent the transfer wires from slipping past the points of the puncturing wires, as the transfer wires operate by a spring. If there was not a device for stopping them as they strike on the bevel, they would not make a perfect joint or connection at their point of contact. And, therefore, the complainant, in his device has a stop upon his spring, so that the crank, as he calls it, strikes upon the stop and prevents it from passing any further. The defendant has two stops operating substantially the same way in his device, and for the same purpose, although he has arranged them differently, yet they perform the same function, and are, undoubtedly, substantially the same stop, though somewhat differently constructed.

My conclusion, then, is that there is an infringement of this patent shown clearly, and although it is a patent for a device of minor consequence, yet, at the same time, it is just as much entitled to protection as though it was for the most important piece of machinery ever devised.

There will be a decree for an injunction, and a reference to ascertain and report profits and damages.

NATIONAL BANK OF EVANSVILLE vs. THOMAS P. BRITTON, TREASURER, ETC.

CIRCUIT COURT—DISTRICT OF INDIANA—OCTOBER, 1881.

IN EQUITY.

1. NATIONAL BANKS—TAXATION OF SHARES—VALUATION. — Section 5219 of the Revised Statutes of the United States, which provides that National Bank stock may be taxed by a state, but not "at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state," has reference to the entire process of assessment and prevents as well an unequal valuation of such shares, as an unequal rate of percentage thereon.

2. INDIANA REVENUE LAW—DISCRIMINATION AGAINST BANK SHARES—ILLEGAL ASSESSMENT—INJUNCTIONS.—The Indiana Revenue Law provides that the tax upon "credits" shall be only for the balance which may remain after deducting the amount of the taxpayer's *bona fide* indebtedness, but requires that National Bank stock shall be taxed according to its fair value without reference to the indebtedness of its owner. *Held*, that this was contrary to the Act of Congress, and that any holder of shares in the complainant bank, who, at the time an assessment was made, had debts which were not deducted from his other credits, nor from the valuation of his bank stock, was entitled to an injunction against the collection of the taxes upon his shares of such stock.

3. In such case those shareholders who had no debts to be deducted, would not be entitled to such injunction.

4. RIGHT OF NATIONAL BANK TO ENJOIN THE COLLECTION OF TAX UPON ITS SHARES.—The state law having imposed upon the bank officers, the duty of retaining out of dividends belonging to the respective shareholders, a sum sufficient to meet the taxes assessed upon their shares, and having subjected the officer who should pay dividends to a stockholder, before the taxes upon his shares were satisfied, to a personal liability for such taxes, the bank can maintain a suit to enjoin the collection of taxes illegally assessed against the shareholders, in order to protect its officers and prevent a multiplicity of suits.

A. & J. E. Iglehart and *Gilchrist & Butterfield*, for complainant.

H. A. Mattison and *Buchanan, Gooding & Buchanan*, for defendant.

HARLAN, J.—The object of this suit is to obtain a perpetual injunction against the collection of the state, county, road and school taxes assessed in Vanderburg county, Indiana, for the year 1879, upon the shares of complainant's stock, in the hands of its respective owners.

The suit proceeds upon the general ground that some of the provisions of the revenue statute of this state, passed in 1872, and under the authority of which the assessment in question was made, are in conflict with section 5219 of the Revised Statutes of the United States, which permits, as did previous legislation, state taxation of National Bank shares, subject to two restrictions, one of which is, that such taxation "shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state."

Some of the papers connected with the valuation of these shares indicate an assessment against the bank itself. But an examination of all the papers satisfies me that the assessment was intended to be, not against the bank, in its corporate capacity, but against the several shareholders upon the shares held by them respectively. Still, the right of the bank to institute the present suit cannot be doubted. The state law imposes upon the bank officers the duty to retain, out of dividends belonging to the shareholders, a sum sufficient to meet the taxes assessed upon their respective shares. And the law, further, subjects the officer who pays dividends to a stockholder before the taxes upon his shares are satisfied, to personal liability for such taxes. What was said in *Cum-*

mings vs. National Bank, 101 United States, 157, may be repeated here: "The bank, as a corporation, is not liable for the tax, and occupies the position of a stakeholder, on whom the cost and trouble of the litigation should not fall. If it pays, it may be subjected to a separate suit by each shareholder. If it refuses, it must either withhold dividends and subject itself to litigation by doing so, or refuse to obey the law and subject itself to suit by the state. It holds a trust relation, which authorizes a court of equity to see that it is protected in the exercise of the duties appertaining to it. To prevent multiplicity of suits, equity may interfere."

Passing this preliminary point, I come to the consideration of certain questions arising upon the merits, as to some of which I have had very great difficulty.

In *People vs. Weaver*, 100 United States, 539, it was ruled that the inhibition upon state taxation of National Bank shares "at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens," had reference to the entire process of assessment, and prevented as well an unequal valuation of such shares, compared with other moneyed capital, as an unequal rate of percentage thereon. Consequently, a statute of New York, which prescribed a uniform rate of taxation upon personal property, but permitted the taxpayer to deduct his just debts from the aggregate value of his personal property, other than shares of bank stock, (from the value of which latter property no such deduction was allowed,) was held to work an illegal discrimination against moneyed capital invested in such shares. Such a mode of valuation, the Supreme Court of the United States held, had the effect to impose greater burdens upon moneyed capital invested in bank shares than upon other moneyed capital in the hands of individual citizens.

In *Pelton vs. National Bank*, 101 United States, 146, the court said: "It is sufficient to say that we are quite satisfied

that any system of assessment of taxes which exacts from the owner of the shares of a National Bank a larger sum in proportion to their actual value than it does from the owner of other moneyed capital valued in like manner, does tax them at a greater rate, within the meaning of the Act of Congress."

The fundamental inquiry, therefore, is whether the statute of Indiana prescribes any rule of taxation of moneyed capital which necessarily conflicts, or which, in its application, may conflict, with the Act of Congress permitting state taxation of National Bank shares.

In the prosecution of this inquiry, I have examined with great care the numerous and, in some respects, complicated, provisions of the act of 1872. My examination has been conducted in the hope that I should be able to reconcile the state law in all its parts with the Act of Congress. But in that hope I have been disappointed. I am of opinion that the state revenue act establishes a rule of taxation which operates in certain cases to subject National Bank shares to greater burdens than the same act imposes upon other moneyed capital in the hands of individual citizens of Indiana.

A very brief reference to the provisions of the state law will establish this proposition.

That law provides for the taxation of National Bank shares, in the hands of the respective owners, according to their fair cash or selling value. It excludes from the valuation of such shares any estimate whatever of the shareholder's debts. No allowance or deduction on that account is permitted. Although his debts may exceed the value of his National Bank stock, he must pay taxes on the cash value of that stock, without reference to the amount of such indebtedness.

Turning, now, to the general provisions of the state law, regulating the assessment and valuation of the personal

property of individual citizens (other than bank shares), I find that each taxpayer is required to list, among other things, his "credits."[1] Under that head is included "money at interest, within or without the state." To that effect is the recent decision of the Supreme Court of this state in *Matter vs. Campbell*, 71 Indiana, 512. He is not taxed for the full or fair value of such credits, but only upon the balance which may remain after deducting the amount of his *bona fide* indebtedness, including his proportionate liability as surety for others,—arising from the inability or insolvency of the principal debtor, and for which he believes himself to be legally and equitably bound,—but excluding all acknowledgments of indebtedness, not founded on actual consideration, or made for the purpose of being deducted.[2] Plainly, therefore, money capital represented by loans, or invested in "credits," is not taxed as money capital represented by National Bank stock, is taxed, viz.: according to its fair value, without reference to the indebtedness of the taxpayer. Only so much of a taxpayer's credits is taxed as exceeds the amount of his *bona fide* indebtedness. A single illustration will show the operation of the state law in some cases of common occurrence. Suppose that A, having $10,000 in money, owing debts to the amount of $6,000 and having no credits, should invest that money in National Bank shares. By the state law, as we have seen, he is required to pay taxes on the amount so invested, without deduction, in any form, of his indebtedness of $6,000. But if he should loan the $10,000 and take a note therefor, or if he should purchase promissory notes with that money, thereby becoming the owner of credits, he will not be required to pay taxes upon the money value of

[1] 1 Davis' Rev. St. Ind., 1876, pp. 76, 81; Secs. 15, 48.

[2] 1 Davis' Rev. St. Ind., p. 86; Secs. 53-4; *Matter vs. Campbell*, 71 Ind., 512.

his credits, but only upon $4,000, the difference between his credits and his indebtedness.

It is thus seen that under the operation of the rule prescribed by the state law, moneyed capital not invested in National Bank shares, will, in such cases as the one supposed, be burdened with less taxation than the same amount of capital invested in such shares would be. Congress, in granting authority to the state to tax National Bank shares, certainly did not intend to expose moneyed capital so invested, to greater burdens than were imposed upon other moneyed capital in the hands of individual citizens. On the contrary, its intention was for all purposes of local taxation, to place moneyed capital represented by National Bank shares, upon the same footing with the most favored moneyed capital in the hands of individual citizens of any state exercising the power granted by Congress. Here, the state law, by way of diminished taxation, accords to moneyed capital invested in credits, held by its citizens, privileges of a substantial character which it denies to moneyed capital invested in National Bank shares.

The state law, in effect, holds out an inducement to invest in credits rather than in National Bank shares. It seems to me that that law enforces, in certain cases, a rule of taxation inconsistent with the principle of equality which underlies the legislation of Congress, and conformity to which is essential to the validity of state taxation of National Bank shares.

There are other grounds upon which the learned counsel of complainant assail the state law.

It is contended that the shareholders are subjected to double taxation, as to the real estate of the bank, because, in addition to the taxation of shares at their cash value, the bank was required to pay and did pay taxes for the same year upon the real estate used in its business. It is quite

sufficient to say that the bank is not entitled to relief upon this ground, since it satisfactorily appears that, excluding the real estate of the bank, the shares are not assessed beyond their fair cash or selling value.

The objection that the state law makes a discrimination in favor of individuals and corporations (other than National Banks) owning United States bonds and securities, is not, I think, well taken. If I do not misapprehend this objection, it rests upon the ground that the state does not impose taxes upon securities which the law exempts from taxation. In determining whether the state has made an improper discrimination against moneyed capital invested in National Bank shares, we must look to what it has done in reference to those kinds of moneyed capital over which it has complete control for all purposes of taxation.

I come now to inquire as to what extent relief can be given to complainant by reason of the ruling that the state law establishes a principle which, in its operation, may injuriously affect the rights secured by the act of Congress to shareholders in National Banks. I say *may* injuriously affect, because if the complainant's shareholders, at the time of the assessment in question, had no indebtedness to others to be deducted from the value of their assessed moneyed capital in whatever shape that capital was, it is clear that neither they, nor the bank as their representative, could properly invoke the judgment of the court as to the constitutionality of the state law, or obtain any injunction for the protection of shareholders who were not, in fact, injured by the assessment. In such a case the question would be wholly abstract, and the court would not consume time in its consideration. The bank, I have already said, had a right to institute this suit for its protection, and, for that purpose, to ascertain what shareholders had the right to dispute the validity of the assessment, and, consequently, to demand the full amount of

their dividends, without deduction for taxes assessed upon their shares. But the bill does not allege that *all* the shareholders were in a condition to complain of the assessment. It alleges only that "sundry" or "many" of them had indebtedness which the state law did not permit to be taken into account in the assessment and valuation of their moneyed capital invested in National Bank shares. The evidence shows only four stockholders to have been in that condition, viz.: Samuel Bayard, Fred. A. Preston, John D. Preston, and David J. Mackey. This proof was, no doubt, made for the purpose of illustrating the practical operation of the state law.

In view of the rule established by the state law, I am of the opinion that every shareholder of complainant, subject to taxation in this state upon his credits, and who, at the time of the assessment, had debts which were not deducted from his credits, because he had no credits, and which were not deducted from the valuation of the bank shares because the state law would not permit that to be done, is entitled, through the complainant, to an injunction against the collection of the taxes assessed upon his shares for the year 1879. The decree can go no further.

A few days since I addressed a letter to counsel, authorizing a final decree to be entered, perpetually enjoining the collection of all the taxes assessed upon the complainant's shares of stock for the year 1879. Further reflection satisfies me that such a decree would be erroneous, and that the decree should not be broader than just indicated. Since the case has not been prepared or defended upon the theory that the proof should show the condition of each shareholder as to indebtedness at the time the assessment and valuation in question was made, the parties should have a fair opportunity to make such proof. The cause must, therefore, go to a master to ascertain and report the facts.

Counsel may prepare the proper order of reference indicating the opinion of the court as far as herein disclosed. There are many details connected with the convenience of counsel which should be considered in framing the order. I leave counsel to agree upon such details. If they cannot do so, I will receive from each side a draft of an order, and will adopt and have entered that one which meets my approval.

NOTE—This case was affirmed by the Supreme Court in 105 United States, 322. And see also *Supervisors vs. Stanley, Id.*, 305, and *Hills vs. Exchange Bank, Id.*, 319.

Consult also, *National Bank vs. City of Paducah*, 2 Flippin, 61, as to the right of a National Bank to enjoin the collection of a tax upon its shares, assessed against its stockholders; and for a case of unlawful discrimination.—REPORTER.

JOSEPH PRATT vs. S. C. ALBRIGHT; D. W. KING, GARNISHEE.

CIRCUIT COURT—EASTERN DISTRICT OF WISCONSIN—OCTOBER, 1881.

1. REMOVAL OF CAUSE—GARNISHEE PROCEEDINGS.—An issue between a plaintiff and a garnishee as to the liability or indebtedness of the latter to the defendant in the principal action, is not such a controversy as can be removed, separate and apart from the principal action, from the State to the Federal Court on the ground of citizenship. It is simply an auxiliary proceeding to be disposed of by the same court which has jurisdiction over the original suit.

2. SAME.—The fact that the garnishee proceeding was instituted under the state statute, concurrently with the suit against the principal defendant, and that the principal suit has been disposed of by judgment

against such defendant, does not bring the garnishee suit within the contemplation of the Removal Act.

Motion by garnishee to remand cause to the State Court, from which it had been removed on petition of the plaintiff.

Hastings & Greene, for plaintiff.

Goodwin & Benedict, for D. W. King, garnishee.

DYER, J.—A statute of the state of Wisconsin provides that either at the time of the issuing of a summons, or at any time thereafter before final judgment, in any action to recover damages founded upon contract, express or implied, or at any time after the issuing in any case of an execution against property and before the time when it is returnable, proceedings of garnishment may be had by the plaintiff in the action against any person indebted to the defendant, and a course of procedure is prescribed by which the garnishee may be required to answer as to any such indebtedness, and may be made amenable to the orders of the court wherein the principal action is pending.

It is further provided that when the garnishment is not in aid of an execution, no trial shall be had of the garnishee action until the plaintiff shall have judgment in the principal action, and the proceeding is to be deemed an action by the plaintiff against the defendant in the principal suit and the garnishee, as parties defendant. The statute also authorizes the defendant in the principal action to defend the proceeding against the garnishee, and the garnishee, at his option, to defend the principal action for the defendant if the latter does not defend. With these statutory provisions in force, the plaintiff herein commenced a suit in the State Court against the defendant Albright to recover the amount due upon an accepted bill of exchange, and, concurrently with the commencement of that action, instituted garnishee proceed-

ings against D. W. King, named also as defendant, as the action is entitled in this court. The foundation of these proceedings was such an affidavit as the statute requires, and the garnishee was summoned to appear and answer whether he was indebted to the principal defendant. Both the affidavit and the summons were entitled, "*Joseph Pratt, plaintiff, vs. S. C. Albright, defendant; D. W. King, garnishee.*" The garnishee, by answer in due form, denied all indebtedness or liability to the principal defendant, and an issue upon that question was thus formed. Afterwards, and while the garnishee proceeding was pending, judgment was obtained by the plaintiff upon his demand in the principal action against the defendant. Thereupon, the plaintiff, a citizen of Illinois, filed a petition in the State Court for removal of the case to this court; King as garnishee, and Albright as the principal debtor, being named in the petition as citizens of Wisconsin, and as defendants in the action or proceeding sought to be removed. Upon the execution of the requisite bond the State Court ordered the case removed to this court. The removal was made under the act of March 3, 1875, and the evident purpose of the plaintiff was to bring the garnishee proceedings into the Federal Court for final disposition. A motion is now made to remand, and the determination of the motion involves the question whether the action against the garnishee is a suit that may be removed within the contemplation of the Removal Act.

The language of the second section of that act is "that any suit of a civil nature, at law or in equity, now pending, etc., * * * in which there shall be a controversy between citizens of different states, may be removed." It is, of course, obvious that the principal suit, wherein the plaintiff and Albright were the sole parties, could not be removed when the present removal proceedings were instituted, because

final judgment in that action had been previously entered. What was the garnishee proceeding? In the light in which it must now be considered, was it anything more than a graft upon the principal action—a mere auxiliary or incident to the main proceeding? It seems to me it was not, and that, under the authorities it must be so regarded. It was in the nature of a supplementary or auxiliary proceeding in aid of a suit for the recovery of a debt, which suit could not be removed because it was determined before any removal to the Federal Court was attempted. It is true that under the state statute the garnishee is required by summons to answer the plaintiff's affidavit upon which the proceedings are founded, and it is also true that the statute declares, with the evident view of maintaining an orderly course of procedure, and of suitably protecting the rights of the parties, that the proceeding against a garnishee shall be deemed an action. But it is, after all, essentially but a branch of the main suit, and since that suit was not removable, I am of the opinion that the garnishee proceedings could not be transferred to this court. This conclusion is supported by authorities which are entitled to weight as bearing upon the question.

In *Weeks vs. Billings*, 55 New Hampshire, 371, the question arose whether a defendant under trustee process,—which in its purpose and general character, as existing in New Hampshire, is analogous to garnishee process or procedure in this state—could remove the proceeding to the Federal Court, there to be tried as a suit against him; and it was held that he could not. In the opinion of the court it is, among other things, said that—

"Although the trustee may in some sense be regarded as a defendant, and the question of his liability be tried by a jury or by a court, he has, nevertheless, never been regarded by the courts as a defendant in the proper and usual sense of the term, and, in common parlance, is known and called by

the name of trustee, while his alleged creditor is called the principal defendant. They are not sued in the same right, and are not answerable to the plaintiff in the same manner. The principal is sued on account of some alleged injury which the plaintiff has sustained by his act or neglect. But, as between the plaintiff and trustee, there is no privity of contract, or other act or neglect by which the plaintiff has sustained damage. The property and credits of the principal defendant in his hands are attached, and he is summoned to show cause why execution should not issue against him for the damages which the plaintiff may recover against the principal defendant. The process as to him is rather to be regarded as an attachment of the defendant's property in his hands; and even if this were an action in which the State and Federal Courts had original concurrent jurisdiction of the funds of the defendant in the hands of the trustee, the State Court being the one before whom proceedings were first had, and whose jurisdiction first attached, would retain its jurisdiction to the exclusion of the other court, if the only controversy were as to the disposition of the funds so attached."

The removal in the case cited was attempted to be made under the second clause of section 639 of the Revised Statutes, but the discussion of the question by the court, from whose opinion the foregoing extract is made, applies with force to the question as it arises in the case at bar, since, under all the statutes authorizing removal of causes to the Federal Court, the proceeding removed must be a suit in the sense of those statutes; and it was not contended on the argument that the act of 1875 is in that regard different from the judiciary act of 1789, or the Removal Acts of 1866 and 1867.

In Iowa an "occupying claimant" of land, who is an unsuccessful defendant in an ejectment suit, has a right to retain possession, after judgment against him, until the value of his improvements are ascertained, provided he files his

petition therefor in the main action after judgment, but before the plaintiff causes it to be executed. In *Chapman vs. Barger*, 4 Dillon, 557, it was held that this proceeding by petition, for ascertaining the value of improvements upon land, was not removable to the Federal Court under the act of March 3, 1875; and for the reason that it was essentially part of and ancillary to the main suit, which was at an end; judgment having been rendered therein in the State Court. So, with equal force, it may be said of the case at bar, that the garnishee proceeding is a dependence of and ancillary to the principal suit, which has been brought to an end by judgment in the State Court.

In *Webber vs. Humphries*, 8 Reporter, 66, an execution upon a judgment in a State Court against a corporation was returned *nulla bona*, and a motion was then made under the statutes of Wisconsin for an execution against one of the stockholders. The stockholder then took the necessary steps to remove the case into the Federal Court, and a motion to remand was sustained on the ground that the proceeding sought to be removed was a mere sequence or dependency, or proceeding supplemental to the main action.

In *Bank vs. Turnbull & Co.*, 16 Wallace, 190, after judgment recovered in a State Court, an execution was issued and levied upon property in the possession of the judgment debtor, but the ownership of which was claimed by third parties. The claimants, Turnbull & Co., thereupon applied to the court under the statutes of the state for leave to intervene. Leave was granted, and an order was made for trial by jury of the question whether the judgment debtor or Turnbull & Co. owned the property. Thereupon, the claimants of the property removed the case to the Federal Court, and the question decided by the Supreme Court was whether the case was thus removable. Mr. Justice Swayne, speaking for the court, said: "Conceding it [meaning the proceeding instituted

to try the right of property] to be a suit, and not essentially a motion, we think it was merely auxiliary to the original action, a graft upon it, and not an independent and separate litigation. A judgment had been recovered in the original suit, final process was levied upon the property in question to satisfy it, the property was claimed by Turnbull & Co., and this proceeding, authorized by the laws of Virginia, was resorted to to settle the question whether the property ought to be so applied. The contest could not have arisen but for the judgment and execution, and the satisfaction of the former would at once have extinguished the controversy between the parties. The proceeding was necessarily instituted in the court where the judgment was rendered, and whence the execution issued. No other court, according to the statute, could have taken jurisdiction. It was provided to enable the court to determine whether its process had, as was claimed, been misapplied, and what right and justice required should be done touching the property in the hands of its officer. It was intended to enable the court, the plaintiff in the original action, and the claimant, to reach the final and proper result by a process at once speedy, informal and inexpensive. That it was only auxiliary and incidental to the original suit, is, we think, too clear to require discussion."

In accordance with these views the court below was directed to remit the case to the State Court, and nothing need be added to emphasize the analogy upon principle between that case and the case at bar.

In *Barrow vs. Hunton*, 99 United States, 80, an action of nullity was instituted in a State Court to set aside a judgment that had been recovered in the same court wherein that action was brought. The case was removed to the Federal Court, and the question decided by the Supreme Court was whether the proceeding to procure nullity of the judgment was to such an extent an independent, separate suit as to make it

removable. It was held that it was rather in the nature of a supplementary proceeding, so connected with the original suit as to form an incident to it and substantially a continuation of it, and was not transferable to the Federal Court as a suit of which that court could take cognizance.

The statute of Wisconsin relating to garnishment, as we have seen, provides for garnishee proceedings as well after the issuing of an execution as before judgment, and if in this case execution had been issued, and the proceeding against the garnishee had taken place after that event, I think it would hardly be contended, in the light of the authorities, that such a proceeding could be removed to the Federal Court any more than a proceeding purely supplementary to execution could be so removed. And when we consider the essential character of a garnishee proceeding, I do not think the fact that the action against the garnishee was instituted while the principal suit was pending, and before judgment and execution, lends any additional force to the argument in favor of removal.

The attention of the court has been called to the case of *Tuntstall vs. Worthington*, Hempstead, 662, wherein it was held that proceedings against a garnishee, after execution, was so far a civil suit that the Federal Court had not jurisdiction thereof, if the parties thereto were citizens of the same state, although judgment upon which the execution was issued was recovered in that court. The soundness of this decision may well be doubted, in the light of later authorities; for it is fully settled that even a creditor's bill, to enforce payment of a judgment recovered in the Federal Court, is but a continuation of the original suit at law, and may be prosecuted in that court without regard to the citizenship of the parties.

Keith vs. Levi, 1 McCrary, 343, was cited on the argument as an authority to the effect that a controversy between citizens of different states, as to the validity of an attachment, consti-

tuted a removable case within the meaning of section 639, of the Revised Statutes. But the question of the validity of the attachment in that case arose upon a plea in abatement to the petition in the principal suit, which alleged that the defendant was about to fraudulently dispose of his property, and hence was one of the issues in the main case. The authority is therefore not applicable. Nor do I think that *Watson vs. Bondurant*, 2 Woods, 166, which was also cited, has any application to the question here presented for adjudication.

On the whole, my opinion is that the preceeding against the garnishee, which it is sought to bring within the jurisdiction of this court by removal after judgment in the original action, is, in the language of the court in *Bank vs. Turnbull*, *supra*, merely auxiliary to that action, a graft upon it, and not such an independent, separate suit as may be removed to this court under the Removal Act of 1875.

Motion to remand granted.

UNITED STATES vs. FRANK BIXBY.

DISTRICT COURT—DISTRICT OF INDIANA—NOVEMBER, 1881.

1. NOTARY PUBLIC—ELIGIBILITY OF MINORS—INDIANA STATUTES.—There is nothing in the Constitution or Statutes of Indiana making minors ineligible to the office of notary public; such office is not a county office within the meaning of the Constitution wherein it provides that none but electors shall hold county offices.

2. SAME—COMMON LAW.—At common law a minor is eligible to the office of notary public.

This was an indictment for perjury. The defendant pleaded that the notary who administered the oath to him was a minor.

On Demurrer to plea.

Chas. L. Holstein, U. S. District Attorney, for United States.

McDonald & Butler and *Gordon, Lamb & Shepard* for defendant.

GRESHAM, J.—The indictment charges that the defendant committed perjury in swearing to the truth of a quarterly report as assignee in bankruptcy, before Auretus W. Hatch, a notary public. The defendant pleads specially that at the time the alleged oath was administered to him by Hatch, the latter was a citizen of Marion county, Indiana, and a minor, under 21 years of age. A demurrer to this plea presents the following questions, viz.:

(1) Are minors ineligible to the office of notary public under the Constitution or Statutes of Indiana? (2) If not, are they ineligible at common law?

Article 6, § 2, of the Constitution, declares that there shall

be elected in each county, by the voters thereof, a clerk of the circuit court, auditor, recorder, treasurer, sheriff, coroner, and surveyor.

Section 3 declares that such other county and township officers as may be necessary shall be elected or appointed in such manner as may be prescribed by law. Section 4 declares that no person shall be elected or appointed as a county officer who shall not be an elector of the county. Article 2, § 2, declares that only males, 21 years of age, are electors.

The first section of the act providing for the appointment of notaries public, and defining their powers and duties, (1 Davis' Ind. Rev. St., 634,) provides that such officers shall be appointed and commissioned by the governor, upon a certificate of qualification and moral character from the judge of the Circuit or Common Pleas Court of their counties, respectively, and shall, before they enter upon their duties as such, take an oath of office before the clerk of the Circuit Court of their counties, respectively, and file in his office, to be approved by such clerk, an official bond. Section 5 of the same act confers power upon notaries to take and certify acknowledgments of deeds and other instruments of writing, to administer oaths generally, to take and certify depositions, and to do such acts as, by common law and the custom of merchants, they are authorized to do. Section 7 provides that no person holding a lucrative office, or being an officer in any bank or corporation possessed of any banking powers, shall be a notary public. Section 4 of a later act, (1 Davis' Ind. Rev. St., 635,) declares that the jurisdiction of a notary shall be co-extensive with the limits of the state, but no notary shall be compelled to act beyond the limits of the county in which he resides.

The authority of notaries extends throughout the state, and they are not required by statute to be 21 years of age. But it is urged by counsel for defendant that under the Constitution

none but males 21 years of age are electors; that no person not an elector can hold a county office; and that notaries are county officers. Notaries have nothing to do with the affairs of the county, and they discharge no duties as county officers. In taking and certifying acknowledgments of deeds and other written instruments, administering oaths, and in doing such acts as by common law and the custom of merchants they are authorized to do, they do not act as county officers. They are not needed in the administration of county affairs, and they are not county officers within the meaning of the Constitution. There is nothing in the Constitution or Statutes of Indiana making infants ineligible to the office of notary public. Unlike most of the states, Indiana has not declared, in her Constitution or Statutes, that only those who have attained the age of 21 years shall be eligible to any public or civil office.

While at common law persons are not admitted to full enjoyment of civil and political rights until they have attained the age of 21 years, yet infants are capable of executing mere powers, and, as agents, of making binding contracts for others. In England they are allowed to hold the office of park-keeper, forester, jailer, and mayor of a town; and in both England and this country they are capable of holding and discharging the duties of such mere ministerial offices as call for the exercise of skill and diligence only. They are not eligible to offices which concern the administration of justice, on account of their inexperience, and want of judgment and learning.[1]

Stevens S. Mason was appointed secretary of the territory of Michigan by President Jackson in 1831, when he was but 19 years of age, and while yet an infant he became acting governor, and the vigor and wisdom which he displayed in

[1] *King vs. Dilliston*, 3 Modern Reports, 222; Tyler, Infancy & Cov. Sec. 78.

these offices vindicated the propriety of his appointment. Other instances might be cited in which infants have discharged the duties of purely ministerial offices which did not concern the administration of justice. It need hardly be said that the office of notary public is ministerial, and that it does not concern the administration of justice.

Demurrer sustained.

In re CONRAD YOUNG.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—NOVEMBER, 1881.

IN BANKRUPTCY.

1. GENERAL ORDER PROVIDING FOR DISCHARGE OF BANKRUPTS.—The District Court has the right to make an order providing that unless any bankrupt shall take the necessary steps to have the question of his right to a discharge ready to be determined on or before a certain date, that any creditor may, without notice, move for a final order closing the case, and denying the discharge for want of timely application therefor

2. TIMELY APPLICATION FOR DISCHARGE.—But if no such motion is made by a creditor and no order entered denying a discharge, the bankrupt has the right afterwards to apply for his discharge.

3. PRACTICE—REFUSAL OF CLERK TO RECEIVE PETITION TO FILE.—If a bankrupt offers to file his petition for a discharge in due time, the refusal of the clerk to receive and file the petition will not prejudice his right, as then existing, to a discharge.

4. *In re Forsythe*, 9 Bissell, 560, followed.

Petition for review.

James Coleman, for bankrupt.

John W. Ranstead, for opposing creditor.

DRUMMOND, J.—The bankrupt in this case was adjudged a bankrupt in 1878. On the 6th of September, 1880, no application for a discharge having been made to the District Court by him, that court made an order that all bankrupts who should not take the necessary steps to have the question of their right to a discharge ready to be determined on or before the first Monday in December following, would be deemed to have unreasonably delayed in endeavoring to obtain a discharge, and it was declared that any creditor, or other person, interested in the bankrupt's estate, might without notice, move for a final order closing the case and denying the discharge for want of timely application therefor. The bankrupt had notice of this order, but the counsel who had attended to his case being sick, he states that he was informed and believed on that account, no steps would be taken to prejudice his right to make the application for a discharge. On the 15th of December, the bankrupt caused an application in due form to be made for his discharge, and presented to the clerk of the District Court who refused to receive it because of the order of the court of the 6th of September.

On the 3d of January, 1881, the matter was brought to the notice of the District Court by a petition in due form alleging these facts, and on the same day a creditor of the bankrupt, who had previously proved his debt against the estate, made an application to the court for a final order closing the case and denying a discharge to the bankrupt, and the court thereupon granted the application of the creditor, and denied the bankrupt his discharge for want of a timely application for a discharge. It is this order of the District Court which the bankrupt asks to have reversed, and that the District Court should grant his discharge, and the only question in the case

is whether he should have been permitted to apply for a discharge under the facts stated.

There can be no doubt it was entirely competent for the District Court to make the order of September, 1880. Proceedings were pending in many cases without any application having been made for the discharge of the bankrupts, respectively, and it was quite proper that some action should be taken by the court in order to finally close all the various proceedings. The only question is, whether the court could refuse the application before the case was finally closed by some action which had that effect. The law upon this subject, as it was modified by the amendment of July 26th, 1876, is as follows:

"At any time after the expiration of six months from the adjudication of bankruptcy, or if no debts have been proved against the bankrupt, or if no assets have come into the hands of the assignee, at any time after the expiration of sixty days *and before the final disposition of the cause*, the bankrupt may apply to the court for a discharge from his debts. This section shall apply in all cases heretofore or hereafter commenced."

If there had been an order of the District Court made, as contemplated by that of the 6th of September, 1880, finally closing the case before the application was made by the bankrupt for a discharge on the 15th of December, there could have been no doubt that it would have been too late, but in fact no action was taken by the court finally closing the case until after the application for a discharge was made to the clerk of the court. On the 3d of January, 1881, the bankrupt called the attention of the court to the fact that he had made his application on the 15th of December, 1880. He ought not to be prejudiced by the refusal of the clerk then to receive and file the petition for a discharge. At that time the case had not been finally disposed of, and it was not until the 3d of

January, 1881. I adhere to the ruling made in the case *In re Forsythe*, 9 Bissell, 560, that "in order to deprive the bankrupt of the right to make his application for a discharge, there should have been some action of the court to the effect that the case had been finally disposed of." So that I think the true construction of the order of the District Court of the 6th of September, 1880, when considered in connection with the Act of Congress upon this subject, already referred to, must be that until the final disposition of the cause by some action of the court, the effect of which is to show such disposition, the bankrupt has a right to present his application for a discharge, because the statute gives him that right, and if there is no other reason than such as appears in this case, his discharge ought to be granted.

The order of the District Court, therefore, will be reversed, and that court directed to proceed and grant the discharge, unless some other reason is found to exist than that stated in the order here sought to be reviewed.

EDWARD MITCHELL *et al.* vs. ANDREW LANGDON *et al.*

DISTRICT COURT—NORTHERN DISTRICT OF ILLINOIS—NOVEMBER, 1881.

IN ADMIRALTY.

1. UNLOADING VESSELS—WHEN TO BEGIN—USAGE.—By the usage at the port of Chicago, a consignee is entitled to twenty four hours, or a full day, from the time the vessel arrives in which to furnish her with a dock, and commence unloading.

2. A consignee is not obliged to commence unloading a vessel on Sunday; and where a vessel arrives in port on Saturday morning, the consignee need not begin unloading until Monday morning.

3. DEMURRAGE—DELAY IN UNLOADING.—Where consignee unloaded a vessel from only one hatch at a time, it was *held* that this unreasonably delayed the unloading of the vessel, and entitled libellants to demurrage.

W. H. Condon, for libellants.

C. E. Kremer, for respondents.

BLODGETT, J.—This is a libel for demurrage, in unreasonably delaying the unloading of the schooner Sam. Cook in the port of Chicago. The schooner with a cargo of 564 tons of coal consigned to respondents, Langdon, Richardson & Co., arrived in this port Saturday, October 23d, 1880, and reported at consignee's dock at 9 o'clock in the morning. Consignee did not commence unloading until the morning of the 25th, and did not complete unloading until 5 o'clock in the afternoon of the 28th. The proof shows that they could have unloaded the schooner with the appliances in use on their dock in two days, so that she could have been unloaded on the evening of the 26th.

The important question which has been discussed in this case, is as to whether there was unreasonable and undue delay in commencing the unloading of this cargo, as well as unreasonable delay afterwards. Much of the proof in the record relates to the usage of this port as to the time within which a vessel arriving here is entitled to be furnished with a dock and to be unloaded.

The proof in the case shows that by the usage of this port, and especially in regard to vessels loaded with coal, and the same rule is probably applicable to any other cargo, a consignee is entitled to 24 hours, or a full day, from the time the vessel reports, in which to furnish her with a dock and begin unloading. This seems in view of the nature of the business, to be generally acquiesced in, and so reasonable that I think the court must hold this is a usage which binds the trade in this port. The time of the arrival of a sailing vessel (even if the consignee is advised of the time of her sailing) being dependent entirely upon the weather, the course of the wind, etc., is always uncertain to the extent of several days, and it cannot be expected that a consignee will keep a force of men all the time ready at once to unload the instant the vessel reports. He must have time to collect his men after the arrival of the vessel, and one day would seem to be only a reasonable time for doing this. He may also have other vessels at the dock in process of loading or unloading, and must have some time in which to dispatch them before accommodating the new arrival.

The evidence in this case shows that the vessel arrived and reported Saturday morning. The consignees were not obliged, by the usage of the port, or by the law of the land, to commence unloading her on Sunday. Persons engaged in the unloading of vessels and receiving their cargoes have as good a right to rest on the Sabbath as any other class of laborers and business men, and certainly cannot be compelled to work

against the law or their conscience on Sunday, and, therefore, they were not obliged to begin unloading until Monday morning.

They did commence unloading Monday morning, but only unloaded from one hatch at a time. The vessel had two kinds of coal on board, but there was no bulkhead separating them. The consignees, for their own convenience, had the piles of different sized coal so arranged on their dock that they were obliged, or found it more convenient, to unload only one sized coal at a time, and when that was out they moved the vessel so as to bring one of the other hatches opposite the pile corresponding to that left on board, and then unloaded the balance. This mode of unloading was evidently adopted without regard to the interest or rights of the vessel, and solely because it suited the purpose of the consignees. The vessel had the right, under the law and her charter, to quick dispatch, and this was not given her.

My conclusion then is that the consignees had the right to take 24 hours, excluding Sunday, in which to furnish a dock and begin unloading; and as the Cook arrived on Saturday morning they were not obliged to begin unloading until Monday morning; so there is no ground for complaint against the respondents for not beginning to unload earlier than Monday morning. But I further find from the proof that there was an unreasonable delay of two days after the unloading commenced, for which the libellants should be compensated; and from the proof on the case I fix the rate of compensation at $60 a day.

There will, therefore, be a decree in favor of the libellants for $120, and the costs of the case.

ERICK THORSON *et al. vs.* PETER PETERSON *et al.*

DISTRICT COURT—NORTHERN DISTRICT OF ILLINOIS—NOVEMBER, 1881.

IN ADMIRALTY.

1. EVIDENCE—BOUNDARIES OF STATES—§§ 4520 AND 4521, REVISED STATUTES.—Under sections 4520 and 4521, Revised Statutes, which provide that if a master employs seamen without shipping articles, for a voyage from a port in one state to a port in any other than an adjoining state, the seamen shall be entitled to the highest wages given during the preceding three months, at the port of shipment,—the court will take judicial notice of the legally established boundaries of the different states.

2. ILLINOIS AND MICHIGAN ARE ADJOINING STATES within the meaning of such statutes, the boundary line being the middle of Lake Michigan.

3. BREAKING UP OF VOYAGE OF SAILING VESSEL—RIGHTS OF SEAMEN.—When a sailing vessel is dismasted and rendered incapable of proceeding on her voyage, the voyage is broken up, and the seamen who contracted for the voyage are at liberty to leave as soon as the vessel has come into a port of safety, but if, at the request of the master they remain with the vessel, they are entitled to full wages, and cannot be held to a voyage contract.

4. IMPLIED CONTRACT FOR WAGES.—When a mate has made several voyages with a vessel, at a certain rate per day, and goes upon another voyage without leaving the vessel, it will be presumed, in the absence of controlling proof of a new contract, that he goes upon the same terms as before.

C. E. Kremer, for libellants.

W. H. Condon, for respondents.

BLODGETT, J.—This is a libel for wages, and charges that on the 17th of November, 1880, libellants shipped on the schooner Winnie Wing, of which respondents were owners, and the respondent Peterson was also captain, Thorson as

mate, and Oleson, as seaman, for a voyage from Chicago to Pentwater, Michigan, and return; that the schooner sailed on her voyage the day libellants were employed, but during the morning of the next day she had a collision with another vessel, was dismasted and rendered incapable of proceeding on her voyage, and on the forenoon of the 18th of November was towed into South Haven harbor, where she remained about ten days, when she was towed to Pentwater, her port of destination, where she arrived on the 30th of November.

The defense set up is, that both the libellants were shipped for the round trip at a gross sum of twenty dollars each, and that on the arrival of the schooner at Pentwater, they refused to assist in unloading the schooner, although the master, in view of the fact that the schooner, by reason of the accident to her, was unable to return to Chicago that fall, offered to pay the full wages for the round trip, and libellants' expenses back to Chicago, which they refused to receive. And respondents aver that since said offer they have always been ready and willing and able, to pay the amount so offered, which they insist is the full amount to which the libellants are entitled.

The proof in the case shows to my satisfaction that Thorson was not employed at a gross sum for the round trip, but was employed by the day, at the rate of $3.50 per day. It appears from the evidence that for two or three trips made by this schooner preceding the Pentwater voyage, Thorson had been employed as mate, at $3.50 per day, and that on her return from the last trip preceding the Pentwater trip, he did not leave the schooner, but remained on board of her and assisted in taking on a cargo of grain for Pentwater; and in the absence of controlling proof of a new contract for the Pentwater voyage, I must find that he was continued for the Pentwater voyage in the same capacity and on the same terms on which he had been employed in former voyages.

As to Oleson, the evidence is undisputed that he was employed for the round trip for the sum of $20, but after the vessel arrived in South Haven he insisted upon leaving, saying that he wished to go to Chicago, and ship on some vessel bound for Buffalo, whereby he would get large wages, and have employment for the rest of the season of navigation. The captain refused to allow him to leave, and told him that if he would remain on board until the vessel was safe in Pentwater, he would do what was right by him, and Oleson accordingly remained on board and did duty until the vessel arrived in Pentwater. Thorson remained on the schooner during the time she lay in South Haven harbor, and until her arrival in Pentwater, doing duty as mate all the time she was in South Haven harbor, and he had full charge of the vessel part of the time, because the captain was absent looking for a tug.

On the arrival of the vessel at Pentwater, the captain announced to Thorson and Oleson that he intended to pay them the sum of $20 each and $7 extra, which would pay their fare to Chicago, and that he considered them both as employed by the round trip, and that they were bound by their obligation to remain on board until the vessel was unloaded; and that he would only pay them what he proposed to pay on condition that they did so remain on board and assist in unloading. On this announcement, both libellants left, and the captain refused to pay them any wages, or advance them any money on account of their services.

The libellants further claim that the master of the vessel, having employed them without shipping articles, is liable under sections 4520 and 4521 of the Revised Statutes of the United States, to pay them the highest wages which shall have been given for the preceding three months at the port of shipment, and insist that the proof shows such wages to be $4 per day for seamen, and $4.25 per day for mates; and

that therefore they are entitled to recover wages at these rates. But this statute is only applicable to voyages from a port in one state to a port "in any other than an adjoining state," and as this court is bound to take notice of the legally established boundaries of the different states, it must be held that Illinois and Michigan are "adjoining states" within the meaning of the statute. The boundary line is the middle of Lake Michigan, and the process of this court, for instance, or an Illinois State Court, could undoubtedly be executed on the lake anywhere west of this boundary line. The mere fact that the boundary line is upon the water, and, therefore, perhaps, difficult to determine by physical boundaries or lines palpable to the eye, does not change the operation of the statute in this regard. So that these seamen cannot either of them, I think, invoke this statute in aid of their case and recover larger wages on the ground that the master hired them without shipping articles.

As I have already said, there is no doubt that Oleson shipped for the round trip from Chicago to Pentwater and return, at the gross sum of $20. But I am satisfied that by the dismasting of the schooner the voyage was broken up, and the seamen who had shipped for the voyage were at liberty to leave as soon as the vessel was in a port of safety, the contract for the voyage being ended by the interposition of the *vis major*.[1]

Being dismasted, she could no longer, as a sailing vessel, continue and complete her voyage, and did not attempt to do so, but was subsequently taken to her port of destination by the assistance of a tug.

This breaking up of the voyage by disaster was one of the contingencies of the employment which I must presume to have been contemplated by both parties at the time the con-

[1] *The Dawn*, 2 Ware, 126; *Wilder vs. Kelley*, Abbott's Admiralty, 564; 3d Kent, 196.

tract was made. After the schooner was in a port of safety, and it had become practically impossible to complete the contract, and both parties were, by the disaster, absolved from it, Oleson had, in my opinion, no right to claim that any wages had been earned upon the original hiring, because the original contract was an entirety; but he could, as I have already said, if he chose, leave the vessel at that time. Indeed, I am not sure but that if he remained on board after the vessel arrived at South Haven, with the knowledge and aquiescence of the master, the law would imply a new hiring under the new circumstances which surrounded both parties. But without passing directly upon the question as to whether the law would or would not imply a new hiring, it is sufficient to say that the proof satisfies me in this case that there was a new employment of Oleson by the master. The promise was that if he would remain on board he would do what was right with him, which implied that he would pay him such wages as his services were reasonably worth. He did remain on board and perform his duty until the vessel arrived at Pentwater, and only left when the captain denied his obligation under any new hiring, and insisted that the men were bound by the contract made in Chicago, before the sailing of the schooner. I have no doubt that when the captain repudiated the contract, the libellants had the right to leave the vessel and sue for and recover in this action whatever was then due them.

The conduct of the captain towards these men does not seem to me to indicate that he was willing or intended to do what was right with them under the circumstances. There is no proof that he could not have obtained a tug immediately after the vessel took shelter in South Haven harbor; but it is evident that he took his own time to make the best bargain he could with a tug after the season had nearly or substantially closed, so as to get his vessel towed to Pentwater

at the lowest possible price, and during all this time he kept these men on his vessel when they could have been earning higher wages than he finally proposed to pay them, and undoubtedly, under an implied if not an express promise that he would pay them full wages.

There was no treaty or contract with Thorson in regard to the amount of his wages for this special voyage, and I must, therefore, assume that he can only claim the rate of wages of his former voyages, which was $3.50 per day. The proof would satisfy me that Oleson's wages were fairly worth $3.50 also, but the commissioner, after a review of all the testimony, has come to the conclusion that his wages should be $3.33, and I am not disposed to disturb that finding, as it seems to have been arrived at after a very careful analysis of all the testimony in the case bearing upon the question.

There will, therefore, be a decree in favor of Thorson at $3.50 per day from the 17th of November to the 1st day of December, and for Oleson at $3.33 per day from the 19th of November to the 1st of December.

The master also found that under the promise to do what was right with Oleson, the Captain was bound to pay his fare, which amounted to $7, from Pentwater to Chicago, and with this finding I can find no fault, under the facts in the case. I do not see, however, from the proof, that Thorson was entitled to be returned to Chicago at the expense of the vessel.

Affirmed by Drummond, J., January, 1883, to appear in a succeeding volume of these reports.—[Reporter

THE FAVORITE.

DISTRICT COURT—NORTHERN DISTRICT OF ILLINOIS—DECEMBER 1881.

IN ADMIRALTY.

1. SAILING RULES—DUTIES OF SAILING VESSEL AND STEAMER WHEN APPROACHING.—By the sailing rules, a sailing vessel, when approaching a steamer is bound to keep her course, and it is the duty of the approaching steamer to keep out of the way.

2. STEAMER WITH TOWS IS BOUND BY THE RULES.—The fact that the steamer has barges in tow does not alter the rule. The steamer in such case should take extra and timely precautions to avoid the sailing vessel.

3. COLLISION—NEGLIGENCE.—But little significance is to be attached to the manœuvres which are executed, or attempted on the part of a schooner, or a steamer, when in immediate proximity to each other, and in imminent danger of a collision. The material question is, whether there was any negligence, and by whom, in allowing the two vessels to come so close together as to bring on an impending collision.

On exceptions to finding of Commissioner.

Schuyler & Kremer, for libellants.

Richberg & Kneip and *McCoy & Pratt*, for respondents.

BLODGETT, J.—This is a libel by the owners of the schooner, Grace A. Channon, for damages by a collision between the schooner and the steam propellor Favorite on the waters of Lake Michigan, on the night of August 2nd, 1877, whereby the schooner and her cargo were a total loss.

It is claimed by libellants that the collision occurred by reason of the negligence of those in charge of the steamer in not keeping out of the way of the schooner, while the respondents, the "Kirby Carpenter Company," owners of the steamer,

insist, by their answer and proof, that the collision was so far contributed to, if not caused by, the negligence of those in charge of the schooner, in not keeping her on her course as to relieve the steamer from liability, and also that the steamer, being encumbered with tows, is not governed by rules 20 and 21 of section 4233 of the Revised Statutes of the United States.

The undisputed facts material to the issue are, that on the night of the collision, the schooner, in pursuing a voyage from Buffalo to Chicago, with a cargo of coal, was between Milwaukee and Racine, along the west coast of Lake Michigan, about 9 miles from land, and the steamer was bound from Chicago to Menominee, light, with three barges in tow, also light; the wind was from west to west by north, the night clear, the schooner and steamer each had their proper lights burning, the steamer having two bright white lights burning at her mast head to indicate that she was towing other vessels.

The sailing rules involved in this controversy are:

Rule 4. "Steam vessels, when towing other vessels, shall carry two bright, white mast head lights vertically in addition to their side lights, so as to distinguish them from other vessels."

Rule 20. "If two vessels, one of which is a sail vessel and the other a steam vessel, are proceeding in such directions as to involve risk of collision, the steam vessel shall keep out of the way of the sail vessel."

Rule 21. "Every steam vessel when approaching another vessel so as to involve risk of collision shall slacken her speed, or if necessary, stop and reverse; and every steam vessel shall, when in a fog, go at a lower speed."

It is not my purpose to go into a full analysis of the voluminous proof taken in this case, as that has been sufficiently done in the exhaustive report of the commissioner filed herein. It is sufficient for my purposes to say that it clearly ap-

pears from the proof that the Channon was proceeding on her voyage upon a southerly or nearly south course, with a light sailing breeze, at the rate of from 5 to 6 miles per hour, with the wind over her starboard quarter a little abaft the beam. When about a quarter before 10 o'clock her lookout saw the mast head lights of the steamer at a long distance, say from 5 to 7 miles, nearly dead ahead, he reported the light to the captain, who reconnoitred it through his glass, and ascertained that it was the light of a steamer towing other vessels. Soon afterwards, the steamer showed her green light about a half point or a point over the port bow of the schooner. The speed of the steamer, at the time she sighted the light of the schooner, and up to the time of the collision, was about seven miles per hour. The two vessels continued to approach each other nearly end on until quite close, probably less than a mile of each other, and when the sails of the schooner could be seen by those on the steamer, the schooner showed a torch, and shortly afterwards, thinking, as stated by one of the witnesses, that the steamer was coming right into them, the wheel of the schooner was put to port, and she luffed a point or two into the wind, and at that moment was struck upon the port bow just abaft the fore rigging, and so injured that she sunk within five minutes.

It is contended, on the part of those in charge of the Favorite, that the schooner changed her course, and there is considerable testimony in the case on the part of the respondents to the effect that the lookout on the steamer first saw the green light of the schooner, from which they argue and insist that the course of the schooner must have been somewhat east of south, and that she was to the leeward or east of the steamer. I do not think it necessary to attempt to reconcile the contradictions between the witnesses who were upon the schooner, and those on the steamer, as to which light the schooner first showed to the steamer. The testimony of both

classes of witnesses concurs in establishing the fact that the courses of the two vessels were nearly directly toward each other. The schooner was sailing south, and the steamer was going north, half west, they were approaching each other nearly end on. It is possible that, from time to time, as the schooner fell off from the wind, or luffed up into the wind, she may have disclosed her green light to the lookout on the steamer. They were approaching each other so nearly in a direct line that it is possible, and perhaps probable, that the schooner may have shown, at different moments, without substantially varying her general course, each of her lights to those on the steamer. But, as I have already said, the material fact is, that the two vessels were approaching each other nearly end on. The steamer made no effort to get out of the way, unless it be that, at some interval of time after the light on the schooner was discovered, the wheel of the steamer was put to starboard, and she swung off a point or a point and half to port, where she was steadied and ran for a short time, until the schooner showed her torch, and very shortly after that the collision occurred.

I attach but little significance to the manœuvres which were executed, or attempted, on the part of the schooner or the steamer when in immediate proximity to each other, and a collision was imminent. What men do, or attempt to do, under such circumstances of danger, is generally of little import in determining the question of responsibility for a collision.

The material question is, whether there was any negligence, and by whom, in allowing the two vessels to come so close together as to bring on an impending collision.

It has been urged, with much ability and force on the part of the respondents, that the steamer, being encumbered with tows and having indicated that fact to the schooner by the lights carried at her mast head, was not bound by the provisions of

sailing rules twenty and twenty one, and that the officers of the schooner had an additional degree of responsibility thrown upon them from the fact that they knew they were meeting a steamer towing other vessels, and in support of this decision, I am cited to the opinion of the Supreme Court in the case of *The Syracuse*, 9 Wallace, 672, where the court says:

"A tug with vessels in tow is in a very different condition from one unincumbered, she is not mistress of her motions. She cannot advance, recede, or turn either way at discretion. She is bound to consult their safety as well as her own. She must see that what clears her of danger does not put them in peril. For many purposes they may be regarded as part of herself."

And also to the analagous reasoning of the learned judge of the Eastern District of New York, in *Millbank vs. The Schooner Cranmer*, 1 Federal Reporter, 256.

I think it sufficient for the purposes of this case to say that, in both the cases cited, the collisions occurred in a crowded stream or roadstead where all vessels are charged with increased obligations of mutual care which do not bear upon them when upon the open sea. But in this case the collision occurred upon the open lake where there was ample sea room to have made every manœuvre necessary to insure safety. There were no other vessels to interfere with such manœuvres, and so far as the evidence shows, no lights of other vessels to bewilder or embarrass the parties in charge of the steamer. The obvious duty of this steamer, under the sailing rules, especially as she was encumbered by her tows, was to immediately, or in ample time, take such steps as would prevent the two vessels from coming in dangerous proximity to each other. By the sailing rules, the schooner was bound to keep her course. There is nothing in the rules, nor in the nature of the two vessels, that requires or allows a sailing vessel to change her course when she sights the lights

of an approaching steamer with tows. Her duty, under the rules, is to keep her course, and the duty of the steamer is to keep out of the way of the sailing vessel. The steamer has the right to elect on which side of the sailing vessel she will pass, but is bound to exercise that right with sound judgment, and, therefore, any deviation by the sailing vessel from her course would embarrass the steamer and endanger both.

Notwithstanding the fact that the Favorite had barges in tow, she was still a steamer, and under Rules 20 and 21, bound to keep out of the way of the schooner. Her officers knew that, owing to the three barges astern, she was, for the purposes of many manœuvres upon the lake, lengthened to the extent of her barges and the tow lines connecting them to her, and that, therefore, it would take longer to make the necessary detour from the course of the schooner in order to secure safety; and the only difference I can see between the obligation of a steamer, with or without tows, upon the open lake, as these two vessels were situated, is that the steamer, when encumbered with tows, must necessarily commence her manœuvres so promptly after sighting the lights of a sailing vessel as to make sure that she will not only herself go clear of the sailing vessel, but that her tows will also go clear.

A sailing vessel in a crowded roadstead, coming close to tows under the control of a tug, is undoubtedly bound to use such reasonable precautions as are in her power to avoid a collision with the tows, and the failure to use such a precaution might, under certain circumstances, be such negligence as would create liability on the part of the schooner for a collision; and this was the case of the *Cranmer*, *supra*, decided by Judge Benedict. But the law or rules of conduct governing such cases is not applicable to a case like this. Here was ample sea room, and any deviation by the schooner only increased the danger of both vessels.

I conclude, from the testimony on the part of respondents,

that the lights of the schooner were not sighted by the lookout of the steamer so soon as the lights of the steamer were sighted by the lookout on the schooner, and it also appears that the captain of the steamer was the officer of the deck at the time and for an hour or more preceding the time this collision took place. While the lookout was watching the light, before he had reported it to the captain, the captain came forward, having discovered the light himself and looked at it through his glass. His own version of what took place on his steamer, as detailed in the testimony, is substantially in these words:

"In the first place I was walking the deck back and forth across, as I generally do, on the after part by the cabin, so I had a view of anything coming ahead, and a view of the tow behind; at that time I imagined I saw a green light on the starboard bow. I walked forward and took my glass out of my state-room to look at this light, and from its situation it seemed to me she was steering out of the course and not encroaching on us. I told the watchman to keep a smart lookout for the light, '*don't let her get too close to us; there is no danger now, I am going aft.*' The light bore about a point and a quarter, or a point and a half, on my starboard bow. What called me aft I had a call of nature. During the time I was in the closet I was hunting in my pockets for paper and I found there a letter, a moneyed letter from London, that one of my men had given me that day. When I came out of the closet, I went into my room to put the letter in the safe; as I locked the door of the safe and turned round, I heard the lookout running aft on the port side of the vessel. He said, 'the green light is shut in, and he is showing his red light and a torch light.' I told him to run and port his helm and followed after immediately. I also gave the order to port; I went on the port side and took the bearings. I looked over my rail across the weather side from

the stern, and could not see him; then I knew there was danger; then I stood and took the correct bearings across about ten feet back from the stem; then I saw he appeared aft of our stem on our starboard bow across the deck, where our forestay sail was hauled down and rolled up in a netting. To see this light I had to raise up and look over the sail which he bore about three points on our starboard bow. I looked at him a few seconds and saw it was impossible to clear him with our wheel aport, as the vessel seemed to be swinging to windward, and put my wheel starboard, in the hopes of swinging up side by side and avoiding the blow; but we came in collision immediately after the order was given to starboard and struck the schooner in the after part of the fore rigging; as soon as the collision occurred and I could get up on deck I stopped the engine. The schooner at the time of the collision from all appearances, was heading southwest westerly, and the propeller was heading between north half west and nor' nor'-west."

According to the account given by the captain, who discovered the schooner's light about the same time as his lookout, he saw the schooner's light in such a situation as to know that the two vessels were approaching each other in a nearly direct line, He knew that it was his duty to keep out of the way of the schooner, and yet without any orders to that effect, he simply retires to the after part of his steamer, leaving the lookout in command on deck, under circumstances which called for instant and continuous vigilance and required the constant attention of an experienced and responsible officer. His own speed was about seven miles per hour, and he knew the wind was such as gave the schooner nearly the same speed. And yet, after having answered the call which took him aft, the captain gave his attention to a matter which had nothing to do with navigating his ship, and which he had previously forgotten; and during the time that he was

unnecessarily staying aft, to put the letter in the safe, it is probable that the two vessels got into the dangerous position which produced the collision. Had the order been given at once, inasmuch as she had a right to choose on which side of the schooner she would pass, to change the course of the steamer so as to clearly indicate to those on the schooner that she was intending to give her a wide berth, and had the master returned to his duty, as officer of the deck, promptly after having visited the water-closet, it is probable that, with his experience and the duty devolving upon him at the time the red light was shown, he could then have changed the course of his steamer so as to have avoided the collision. The amount of time which was lost may have been very inconsiderable, but it was precious time, and no conduct of his afterwards in the management of his vessel could retrieve that loss. When he was summoned by the call of the look-out to the command of the deck, it was too late to take in the situation and make the necessary changes which would atone for the negligence which had already occurred. So, too, the proof shows that the steamer could have been stopped in about her length by reversing her wheel, and it seems to me almost certain in the light of the proof, that if the wheel had been reversed, even after the torch was shown, the collision would have been prevented. It is true that by reversing the wheel, without some change in the direction of the steamer, she would have been somewhat imperiled by her tows, but that was a matter which the master should have had in mind all the time, and made the necessary manœuvre with due caution; still that does not relieve him from the obligation to reverse, if the occasion or necessity demanded it. He should have been ready to slacken speed or stop, as the exigency required, but he made no effort to do so.

It, therefore, seems very clear to me that the collision in this case was caused by the negligence on the part of those

in command of this steamer. I have very carefully read the testimony, and have carefully considered the arguments which have been made on the part of the respondents, in support of their exceptions to the finding of the commissioner, and must say that I am wholly content with the conclusions at which the commissioner has arrived in his report, and shall overrule the exceptions, confirm the report, and enter a decree for the libellants in accordance with the recommendations of the report.

A tug and ship in tow are, in contemplation of law, but one vessel under steam, and are bound to keep out of the way of a schooner, and are liable for the damages the latter sustains by a collision: *The Olivita and The Restless*, 108 United States, 699.—[Reporter.

HENRY W. PUTMAN vs. JOHN A. LOMAX.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—OCTOBER, 1881.

IN EQUITY.

INFRINGEMENT OF PATENT—MEASURE OF DAMAGES.—In a claim for damages for infringement of a patent, the profits of which the patentee is deprived on account of the manufacture of the article by the defendant, constitute the measure of damages; and the fact that every operative part of the article was not covered by the patent, does not alter the rule.

Exception to Master's Report.

J. P. Altgeld, for complainant.

Charles E. Anthony, and *West & Bond*, for defendant.

BLODGETT, J.—This was a suit brought by the complainant against the defendant for an infringement of a patent issued to the complainant, and re-issued January 19, 1864, for an improvement in wire bottle-stopper fastening. On the hearing the defendant was adjudged to infringe complainant's patent, and reference was made to a master to hear proofs and report the profits which had accrued to the defendant by use of complainant's patent, and to ascertain and report the damages which complainant had sustained thereby. The master has reported, finding the amount of profits made by defendant by use of complainant's device, within the time in controversy, to be $3,585.11. To this report defendant has filed seven exceptions.

All these exceptions relate to the amount which complainant is entitled to recover from the defendant for the alleged infringement of his patent.

The master found that the defendant had made over 4,000 gross of these fastenings in violation of the complainant's patent; that complainant was in the business of manufacturing fasteners to supply the trade; and that his profits were 86½ cents per gross for the goods at his factory. He therefore fixed the defendant's profits at what would have been the complainant's profits, if the defendant had bought of him.

The claim of this patent, which was sustained by the court in this case, and has been construed and sustained in several other cases by different courts, is "for the 'U' shaped fastener made of wire, with the ends returned and connected to the bottle in order that the pressure on the cork may cause the fastener to hold more securely, as specified;" and it is urged that as the "U" shaped fastener alone does not make the complete instrument or device, but is only one part or element of the device, the profits on the whole fastener (part of which is not covered by the complainant's patent) do not furnish a rule for the measure of the profits made by defendant, or of complainant's damages.

Proof shows that the defendant is engaged in the business of bottling mineral waters, beer, etc., and uses these stopper-fastenings in his business, and also that he has sold some to the trade. It also appears that the complainant was engaged, during the term of infringement, as a manufacturer of these bottle-stopper fastenings under his patent, and had ample facilities to supply the entire demand of the trade for these fastenings.

A patentee has the right to the monopoly given him by his patent, and may exercise that right, either by the exclusive manufacture of his patented article, or he may license others to manufacture on such terms as he chooses, or may sell his patent within certain territory.

There is no proof that the complainant had established a license fee or royalty for the use of his patent, and the fair

conclusion from the proof is that he was deriving his profits solely from the manufacture and sale of the article covered by his patent. If the defendant manufactured for his own use, or for sale, he so far interfered with the complainant's sales, and so far damaged complainant's business. It may, perhaps, also be said, with entire accuracy, under the proof, that defendant, by being his own manufacturer, made a profit to whatever amount he saved over and above what he would have paid if he bought of complainant. Technically, I think, the proofs tend more directly to show complainant's damages than defendant's profits; but I do not deem it necessary to criticise the report in that particular, as it furnishes the *data* upon which the court can act intelligently, and the criticism is more upon the verbiage than on the substance of the report.

The report shows how many of these fastenings were made and used by defendant, and shows that if he had not pirated upon complainant's patent he would have been compelled to buy of complainant, and therefore shows how much complainant was damaged.

As to the point that only part of the fastener is covered by the patent, I deem it enough to say that defendant used what was covered by the patent. If he had not used the wire "U" yoke shaped, but had used the tin yoke, which is said to have been old and not subject to patent, there would have been no infringement. The mere fact that to make an operative fastener under the Putnam patent required a wire collar or band around the neck of the bottle, or some device for attaching the fastener to the bottle, does not seem to me to cut any figure in this case. Nearly every patented device, in order to apply it or make it operative, requires the use, in connection with what is covered by the patent, of something which is old, as in this case. Something to attach the yoke or bail to the neck of the bottle is necessary, and the proof shows the complainant and defendant both made these

fasteners complete, with the wire collar or band to go around the neck of the bottle, so that it could be applied ready for use by merely closing the collar around the neck. In manufacturing his fasteners thus ready for use, complainant made the profit found by the master, and it is no answer to complainant's claim for damages that every operative part of his fastener was not covered by his patent. He made them according to his patent and sold them. The defendant, instead of buying from complainant, made his own fasteners in complete similitude of complainant's patent, and thereby damaged the complainant.

In other words, the complainant, by making fasteners complete for use under his patent, made a profit, and the defendant, by wrongfully using complainant's patent, deprived him of a portion of the profits which he would otherwise have made.

The exceptions are overruled; the report of the master confirmed, and a decree will be entered fixing the complainant's damages at $3,585.11, to be paid with interest from date of the report.

Consult also *Kirby vs. Armstrong, ante*, page 135 and *Callsins vs, Bertrand, ante*, page 445. [Reporter.

WILLIAM YOUNG *et al.* vs. THE GRAND TRUNK RAILWAY OF CANADA.

CIRCUIT COURT—EASTERN DISTRICT OF WISCONSIN—NOVEMBER, 1881.

1. PRACTICE—CONSOLIDATION OF SUITS—DISCONTINUANCE.—Where one party has commenced a number of separate suits against another founded upon independent causes of action of like nature, and such suits have all been consolidated by order of the court upon motion of the defendant, the plaintiff will be allowed to discontinue, without prejudice, as to any one or more of the original causes of action.

2. DISMISSAL OF CAUSE—RIGHT OF APPEAL.—Where several suits between the same parties have been consolidated, the fact that the amount involved in the consolidated suit might allow the defendant the right of appeal, cannot prevent the plaintiff from discontinuing as to one or more of the original causes so as to bring the amount involved below that necessary to allow an appeal.

Van Dyke & Van Dyke, for plaintiffs.

G. W. Hazelton, for defendant.

DYER, J.—Three suits were commenced in this court by the above-named plaintiff against the defendant company to recover damages for alleged delay in the transportation of grain which was shipped by the plaintiff over the defendant's road and consigned to Liverpool. The complaints in the several actions were substantially alike, except that the contracts of shipment were alleged to have been made at different times, thus showing that the several shipments were distinct and independent transactions, each constituting a separate cause of action. The defenses to the actions disclosed by the answers of the defendant were similar. A motion was made by counsel for defendant to consolidate the cases; and as they are of like nature, and as it appeared reasonable

so to do, the court ordered the actions consolidated, and such an order was entered.[1] The plaintiff now moves for leave to discontinue two of the cases. This motion is opposed, and is now to be determined.

It is contended—First, that as the three suits, by the order of the court, have been merged into one, there are no longer two separate cases that can be discontinued. Strictly speaking, this is true; but although the present motion, in form, is one to discontinue two of the actions as originally entitled, I think it may properly be treated as a motion to discontinue as to two of the causes of action in the present consolidated action. And so the question really is, has the plaintiff a right to dismiss his suit as to two of the causes of action upon which he originally commenced independent actions? There can be no doubt that the present consolidated action consists of independent parts or causes of action. Each shipment of grain and each contract upon which the shipment is alleged to have been made constitute a distinct ground of action. They are not simply different transactions growing out of one contract, but they are independent rights of action of like nature, but having no special relation to each other, and brought together by order of the court for convenience at the trial. At the common law a plaintiff had the absolute right to discontinue his action before or after issue joined, and without leave of court. Under the practice now prevailing in this state this right is recognized, except that where a counter-claim is involved there cannot be such a discontinuance of the whole case as would defeat a trial upon the counter-claim.[2]

In the case at bar no counter-claim is set up. It was admitted on the argument that the plaintiff has the right to

[1] Revised Statutes, Section 921.

[2] *Bertschy vs. McLeod*, 32 Wisconsin, 205; S. C. 33 Wisconsin, 176; S. C. 34 Wisconsin, 244.

discontinue his present entire suit. If this be so,—if, in other words, he has the right to discontinue as to all the causes of action,—why has he not the right to discontinue as to one of them? Suppose the case should proceed to trial in its present form, and the plaintiff should offer no proof in support of two of the causes of action, would it not be the duty of the court, on application of the plaintiff, to direct the jury to find for the defendant upon those causes of action as in a case of non-suit? Clearly it would; and in such case the court, in accordance with the usual practice, would enter judgment without prejudice. This I regard a conclusive test upon the question here presented. For if the plaintiff would not lose the right to discontinue at the trial, or at that stage to take a judgment of non-suit as to either or any of the causes of action, it follows as a logical conclusion that the right to discontinue now may be asserted and should not be denied.

But it is contended by the learned counsel for the defendant that to permit the plaintiff to discontinue as to two of the causes of action and prosecute his suit upon the one remaining would involve a disregard of the rule which forbids a splitting up of demands where all should be joined in one suit; and *Bendernagle vs. Cocks*, 19 Wendell, 207, and *Reformed Protestant Dutch Church vs. Brown*, 54 Barbour, 191, are cited. The rule invoked, however, goes no further than against several actions for the same wrong or on the same contract, or on several demands resting in matters of account which may be joined and sued for in the same action. And the cases cited reach only to this extent, for they admit that the rule does not extend to distinct contracts. In the syllabus to *Bendernagle vs. Cocks*, *supra*, the decision is correctly stated, and is to the effect that where a party has several demands or existing causes of action growing out of the same contract, and if the demands or causes of action be split up and a suit brought for part only and subsequently a

second suit is brought for the residue, the first action may be pleaded in abatement or in bar of the second action. That case was one of breaches of several covenants contained in the same instrument. The case at bar is one where each cause of action springs from an independent contract. The several contracts have no relation to each other. They are of kindred nature, but they are none the less distinct, and none the less represent distinct and separate transactions between the parties.

It is, however, further urged that as each of the plaintiffs' demands, when taken separately, does not involve an amount sufficient to enable the defendant, if ultimately defeated, to take an appeal, and as the amount of all the demands when united is sufficient to give a right of appeal, the court cannot permit a discontinuance as to two of the causes of action without jeopardizing a substantial right, namely, a right of ultimate appeal. It cannot be claimed that there is any vested right of appeal at this stage of the controversy, nor that such right would accrue until verdict and judgment should pass. The most that can be said is that there is a possible future right of that character. It is not a right *in esse*. Possibly it is not even a right *in futuro*, because the defendant may have verdict and judgment in its favor. Everything in that respect now rests in contingency, and although it may be that if all the causes of action now in suit were to be prosecuted together, and if the defendant were to be defeated, there would then accrue a right of appeal, I do not think that at the present stage the defendant is possessed of such a right in that regard as can be held to forbid the exercise by the plaintiff of his right, which is more in the nature of an absolute, present right to discontinue as to some of his causes of action.

Upon this point, *Pacific Mail Steamship Co. vs. Leuling*, 7 Abbott's Practice (N. S.) 37, was cited, in which case it

was inferentially held that where a defendant has acquired a right in reference to the subject-matter of the action, a discontinuance in disregard of that right would not be permitted. But the right there spoken of is some right acquired by order or decree of the court already made, and in the face of which a discontinuance is asked. Of course, it is not difficult to understand that a litigation between the parties to a controversy may proceed to such an extent, even before the final judgment or decree, that substantial and valuable rights may accrue or become established, and in that event a discontinuance or dismissal, which would take away or affect such rights, would not be permitted. But that is not this case.

The plaintiff will be granted leave to discontinue, without prejudice, his suit as to the two causes of action contained in the complaints, marked Nos. 2 and 3, on payment of the taxable costs in these two cases.

E. PRATT BUELL *et al.* vs. CINCINNATI, EFFINGHAM AND QUINCY CONSTRUCTION CO. *et al.*

CIRCUIT COURT—SOUTHERN DISTRICT OF ILLINOIS—NOVEMBER, 1881.

REMOVAL OF CAUSES—CONTROVERSY WITH RECEIVER APPOINTED BY STATE COURT.—Where the receiver of a construction company, appointed by a State Court, has gone on under the terms of the order of appointment with the work of construction, and has made contracts for that purpose, if a controversy arises between a contractor and the receiver, or between a contractor and other claimants of a common fund, the State Court under whose authority the contracts were entered into is the proper tribunal to decide the questions, and the contractor is not entitled to have the cause removed to the Federal Court on the ground of citizenship.

Motion at chambers, by William Sturgis, to file a transcript of the State Court and to docket the cause in this court.

J. S. Cooper and *F. H. Kales*, for Sturgis.

J. C. Black, receiver *pro se.*

Dent & Black, for receiver, and other creditors.

Mr. Callaghan, for creditors.

DRUMMOND, J.—The object of the motion is to obtain the opinion of this court upon the question of jurisdiction made in the case. The bill was originally filed by some creditors of the construction company in the Circuit Court of Crawford county, in this State. The construction company had made a contract for building a railroad, and the bill was in the nature of a creditor's bill for the protection of the interests of the plaintiffs. A receiver was appointed by the State

Court, and he was authorized to go on and complete the construction of the road undertaken by the company. Claiming to proceed in pursuance of the authority thus conferred on him, the receiver made the contract in which Mr. Sturgis was interested. If this were a question growing out of an ordinary application made to the State Court by a claimant of the construction company for the protection of his rights, and asking that the property in its custody might be made available for his claim, in whole or in part, and the claim had originated entirely independent of any action of the State Court, possibly there might be some pretence, if the citizenship of the parties justified it, that the cause might be removed. But this is a case where the only right which exists is by virtue of the action of the State Court. The receiver of a State Court, in a suit pending there, was authorized to perform certain acts; to employ men and to make contracts involving the construction of a railroad. In the ordinary case of a receiver appointed by the court to operate a railroad, he may employ agents—as a superintendent, conductor, engineer, or other persons—to perform duties connected with the operation of the road.

It may be that a particular contract which the receiver has made is not authorized, in express terms, by the order of the court appointing him, but still if the act is done under the color of authority of the court, and any controversy arises between the persons employed and the receiver, or between him and other claimants, it would seem as though the court under whose authority this was claimed to be done, is the proper tribunal to settle it. It could hardly have been in the contemplation of Congress that such a course as that supposed would enable a party to transfer a cause to the Federal Court, where the litigation was pending in a State Court. That would be something which grew out of the action of the State Court and its officer in the performance of a duty,

or what he supposed to be a duty. That was substantially this case. Mr. Sturgis has no other standing in this court than what grows out of that posture of the case. He voluntarily went to the State Court and asked, through the receiver, that a contract should be made with him. He undertook to perform that contract. It is to be presumed, in the absence of any evidence to the contrary, that he and the receiver both acted in good faith. Upon a question made in the State Court, it was decided that the contract was not authorized by the terms of the order of appointment; but the court also held that Mr. Sturgis having performed services and having expended money, it was just he should receive compensation for what had been done, and for the money expended.

I think it may be laid down as a sound principle that if a controversy, under such circumstances, does arise between the contracting party and the receiver, or between him and other claimants to the common fund out of which they all seek payment, it is not such a controversy as entitles the contractor to remove the cause to the Federal Court.

In this case, the only question was, what amount should be paid to Sturgis for the work and labor done, materials furnished and money expended. The other claimants, it may be, are in the same condition as himself. They all went before the State Court to represent their different claims and insist that they should be paid. Now, is the possibility that there may be a fund less than enough to pay off the various claims, a question of such a character as to entitle a party to remove the cause to this court? I think not. It is true, Sturgis may say that some of the petitioners had not a just claim to any portion of the fund, or, if they had, that their claim was subordinate to his. If that be so, why should not the State Court have the right to decide the question? Whatever controversy there is has arisen in that court in the administration of the property or assets which it has taken in charge.

It is not the case of an independent controversy which existed when the suit was commenced, but one which has arisen in the execution of the power of the court. It was all done under the color of authority of the State Court, and it seems to me that it would be stretching the act of 1875 beyond any case that has yet been decided, to hold that this court has jurisdiction in such a case as this.

It may be added further, and as an additional reason why this court should not take jurisdiction of the case, that the State Court has proceeded without objection to adjudicate upon the rights of the parties. I think that court should be permitted to go on and distribute the fund which it has or may have in its possession in the case of a sale of the property, to the various claimants. This court must decline to take jurisdiction.

Motion overruled.

WILSON PACKING CO. *et al.* vs. CHICAGO PACKING AND PROVISION CO.

SAME vs. ST. LOUIS BEEF CANNING CO.

SAME vs. ROBERT D. HUNTER *et al.*

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—NOVEMBER, 1881.

IN EQUITY.

1. PATENTS—CANNED MEATS—RE-ISSUED WILSON PATENT, No. 6,870 VOID FOR WANT OF NOVELTY.—The William J. Wilson re-issued patent, No. 6,870, for a new and useful improvement in the process for preserving and packing cooked meats for transportation—consisting in thoroughly cooking the meat by boiling it in water, removing the bone and gristle without disturbing the natural grain of the meat, then placing it, while yet warm with cooking, into a box or case, and pressing it by some suitable apparatus, with sufficient force to remove the air and all superfluous moisture, and thus make the meat form a solid cake, and then closing the box or case air-tight upon the meat,—is void for want of novelty.

2. SAME.—There is nothing new in this mode of preserving meat, unless it is in putting the meat into the cans while yet "warm with cooking," and that does not render the process patentable.

3. RE-ISSUED PATENT, No. 7,923, FOR METALLIC CANS FOR COOKED MEATS, VOID.—The John A. Wilson re-issued patent, No. 7,923, for a useful improvement in metallic cans for containing cooked meat—consisting in a pyramidal-shaped can, having rounded corners and both ends slightly flaring, so as to form shoulders or offsets, against which the head or end pieces rest,—is void for want of novelty.

4. CANNED MEAT AS A NEW ARTICLE OF MANUFACTURE—PATENT FOR, VOID.—Claim 3 of the same patent, which is a claim, as an improved article of manufacture, of solid meat compressed and secured within a pyramidal case or can, so that said can forms a mould for the meat, and permits its discharge as a solid cake, is also void.

5. EXTENSIVE USE NOT PROOF OF VALIDITY OF PATENT.—Courts will not sustain a patent because of the mere fact that the mode described in the patent has gone into extensive use.

West & Bond and *Munday, Evarts & Adcock*, for Wilson Packing Company.

John N. Jewett and *Offield & Towle*, for Libby, McNiell & Libby.

William H. Clifford and *B. F. Thurston*, for all complainants.

Noble & Orrick, Coburn & Thacher, E. N. Dickinson, and *Eldridge & Tourtelotte*, for defendants.

Before Drummond and Blodgett, JJ.

Per Curiam. The cases have all been argued together, and involve the same questions of law and fact, and are founded upon the re-issued patent of William J. Wilson, No. 6,370, of April 6, 1875, for a new and useful improvement in the process of preserving and packing cooked meats for transportation, and in the re-issued patent of John A. Wilson, No. 7,923, of October 23, 1877, for a new and useful improvement in metallic cans for containing cooked meat. The re-issued patent of William C. Marshall, No. 6,451, of May 25, 1875, for a new and improved process for preserving meats, although set forth in the pleadings, is not relied on in the argument, and need not be further considered as an independent ground of relief. These patents were before us in 1879, in the case of *Wilson Packing Co. vs. Clapp*, 8 Bissell, 545.

The most important questions in the case grow out of the patent of William J. Wilson. In his original patent he stated that, in carrying out his invention, the meat was to be first cooked thoroughly, at a temperature of 212 deg. Fahrenheit, so that all the bone and gristle could be removed and the meat yet retain its natural grain and integrity; that a measured quantity of this cooked meat was then, while yet

warm with cooking, pressed by any suitable apparatus into a previously prepared box or case, with sufficient force to remove the air and all superfluous moisture, and make the meat form a solid cake, and that then the box or case was closed air-tight upon the meat. It will be observed that he did not distinctly set forth in this original patent in what manner the meat was to be first cooked. There is in the re-issue no change in the description of carrying out the invention, except he declares it is a "preferable" mode of putting the meat cooked into a box or case while yet warm with cooking. The implication, of course, is that it was not an indispensable part of his description of the invention that it should be thus put in warm. There were two claims in the original, as there are in the re-issue, and the only difference between them is, that in the original, the first claim states that the cooked meat is to be pressed into an air-tight package "while heated with cooking," these last words being omitted in the first claim of the re-issue. While these suits have been pending the plaintiffs have filed a disclaimer of the use of the word "preferable" of the re-issue, thus eliminating it from the description therein contained, and leaving the patent in this respect as it was in its original form. They have also disclaimed the use of the following words of the description in the re-issued patent: "The meat is first cooked thoroughly at a temperature of 212 deg. Fahrenheit, so that all the bone and gristle can be removed and the meat yet retain its natural grain and integrity;" and instead thereof insert the following words, viz: "The meat is first cooked thoroughly by boiling it in water so that all the bone and gristle can be removed and the meat yet retain its natural grain and integrity."

Waiving the objections which have been made to the validity of these disclaimers, we may now state what the invention of the William J. Wilson patent is. The meat is to be first thoroughly cooked by boiling it in water, so that

all the bone and gristle can be removed and the meat yet retain its natural grain and integrity. While yet warm with cooking it must, by some suitable apparatus, be pressed into a box or case, previously prepared, with sufficient force to remove the air and all superfluous moisture, and make the meat form a solid cake. The box or case is then to be closed air-tight upon the meat. So that the invention contains these elements:

(1). Thoroughly cooking the meat by boiling it in water, removing the bone and gristle. (2). Placing it, while yet warm with cooking, into a box or case, and pressing it with some suitable apparatus with sufficient force to remove the air and all superfluous moisture, and make the meat form a solid cake. (3). Closing the box or case air-tight upon the meat.

It will thus be observed that the first requisite is that the meat must be thoroughly cooked by boiling it in water, that mode of cooking called "stewing" not being necessarily excluded, unless the words declaring that "the meat yet retain its natural grain and integrity" have that effect. The patent limits the cooking to this particular mode; baking, roasting, and steaming being excluded as modes of cooking meat. After the bone and gristle are removed there is no description given of any particular manner in which the meat is to be treated before it is put into the box or case, unless the use of the language that "it is then wholesome and palatable" has that effect.

And although the evidence shows that all the meat put up by the plaintiffs, and which has entered so extensively into the markets of the country for sale, is corned meat, that is not a part of the patent; and fresh meat, without antiseptics of any kind, if thoroughly cooked by boiling in water, with the bone and gristle removed, and if, while yet warm with cooking, put into a box or case, closed air-tight, would be

within the description of the patent. Neither is anything said of the extent of the pressure to which the meat is to be subjected when placed in a box or case, except that it must be with sufficient force to remove the air and all superfluous moisture, so that the meat will form a solid cake; nor is the degree of warmth named which must exist when the meat is put into the box or case; neither is any description given of the manner in which the box or case is to be closed air-tight upon the meat. It is claimed by the plaintiffs that this combination of the manner of cooking and preserving meats for transportation is new, and entitled William J. Wilson to a patent. It should be stated that in the original as well as in the re-issued patent of William J. Wilson, it seems to be implied by the second claim, which is made in each, that the box or case must be hermetically sealed. Some criticism has been made upon the use of this word. We do not understand it to mean the same as if it were employed in describing anything as hermetically sealed in a laboratory, but only that the package should be so sealed as to exclude the passage of air into or out of the box or case. The patentee says that his box or case may be made of wood or metal, or both combined, of any suitable form or shape, and of any desired dimensions. It is, perhaps, unnecessary for us to inquire, as all the parties in this case use metal, whether or not the box or case could possibly be made of wood, or whether, in order to accomplish the object which the patentee had in view, it must always be made of metal.

We will, therefore, direct our attention in the first place to the question whether or not what William J. Wilson describes in his specifications, as just stated, was the proper subject of a patent.

The cooking of meat thoroughly by boiling it in water, so that the bone and gristle can be removed, has always been known. If it be admitted that the box or can be

hermetically sealed in order to be air-tight, that was an old device. The Appert process, described in Durand's English patent of 1810, required that the vessel (case or box) in which the food was placed should be air-tight, and that has ever since been regarded as indispensable in any process for preserving such food as is the subject of controversy here. Before the date of the patent to William J. Wilson, meat was placed in a package and subjected to pressure to remove the air, and it is clear that any superfluous moisture was thus also removed from the meat. This is shown in the Marshall patent of 1864, because it is manifest his description of the process necessarily implies the removal of the superfluous moisture from the meat, as well as the removal of the air from the meat by pressure, and the hermetically sealing of the box or case in which the meat is placed for preservation, transportation and sale. De Lignac (1855) submitted meat to a high pressure in the tin cans in which it was to be preserved, and which, apparently, were hermetically sealed. Lyman (1869) roasted his meat before putting it into the box or can, and he speaks in his specifications of stewing, boiling or roasting the meat as being the ordinary mode at that time employed for preserving meat before packing it in cans. It will thus be seen that, prior to the issuing of William J. Wilson's original patent, in 1874, meat was cooked in various ways; was subjected to pressure, by which the air and superfluous moisture were expelled from it, both before and after it was put in the case or box for preservation, and these boxes or cases were hermetically sealed in order to make them air-tight.

The evidence seems to show that at the present time, in order most surely to preserve meat, it is necessary to subject the case or can in which the meat is packed to what is called "processing," which we understand to mean this: There is an opening in the can through which the meat is introduced.

When the can is filled the hole is soldered up. It is then subjected to heat, a puncture made, the air and steam permitted to escape, and then the puncture also soldered up. This is not a new operation, but has long been known. In fact, it is substantially described in the Durand patent as a part of the Appert mode of preserving meat; for, although the details here described are not fully given in the Durand patent, still they are necessarily implied from the statement that the aperture is left in the vessel until the heat shall have produced the proper effect, when it is to be closed. In Appert's method of preserving animal and vegetable food, vessels containing it were placed in a boiler filled with cold water, and then heat was applied up to the boiling point, and vegetables were to be put into the vessels in a raw or crude state—animal substances raw or partly cooked. The "processing," as it is termed, is not set forth in the William J. Wilson patent, unless necessarily implied from the statement that in thus preparing and packing the meat in an air-tight box or case it is a part of the operation. All that the patent says is that after the meat is put into the box or case, and the proper pressure is applied, the box or case is then closed air-tight upon the meat; and if it is also implied that the box, as we have heretofore assumed, is hermetically sealed, still, it is not stated that it is to be subjected to the "ordinary process" in canning.

It seems to be conceded that the reasons which render this necessary, in order to properly preserve meat or vegetables, were not well known at the time it was adopted. The theory at present received upon this subject is that it is necessary to expel from the can or case the air, and what are called the germs of fermentation and putrefaction which exist in that air, and which are destroyed when a high degree of heat is applied; and the air being thus expelled, before it can re-enter, the box is made air-tight. These invisible germs, supposed

to be floating in the air, must be killed or removed, or they will enter into the vegetable or animal substances, and, in a short time, produce putrefaction, and, of course, destroy them as an article of food. There seems to be, therefore, nothing left in the description of the mode of preserving meat pointed out in the patent of William J. Wilson unless it is in putting the meat while warm with cooking into the box or case. Can that be said to be patentable as a part of the mode of preserving meat, even if it be conceded that it has never been done before. We think not. No more than if, prior to the date of the William J. Wilson patent, in order to preserve meat, it had never been put into a can or case thoroughly cooked. Neither of them seems to require ingenuity or the exercise of the inventive faculty. It is manifest, when we consider what was known at the date of the William J. Wilson patent, that these or other methods could be adopted of putting the meat into the case or can for preservation without encroaching upon the domain of the invention of any one.

There can be no doubt that, within a few years past, the method of preserving meat adopted by William J. Wilson has caused the article to be extensively used and sold in the markets of this and other countries. That argument has been pressed with great force upon the court in this case.

It may be admitted that, in all doubtful cases involving the validity of a patent, the fact that a mode described in the patent has gone into extensive use has and often will induce courts to decide in favor of the patent. But, while this is so, courts ought not, merely because of such use, to sustain a patent. The rights of the public are to be protected as well as those of individuals, and a monopoly should not be allowed unless the right to it is clearly shown. But the true explanation of the success which has attended this and similar modes of preserving meat may be in the fact that there has been a tendency in the public of late years to use all kinds of

canned meats and fruits to a much greater extent than formerly, owing to the increased care and skill in their preparation and packing; and we think all William J. Wilson and those who act under him can claim is, that they have been particularly careful in selecting, preparing, seasoning, cooking, and canning their meat, by which it has acquired a high reputation; and upon that, in our opinion, they must rely, and not upon a monopoly under the patent law.

The John A. Wilson patent, of October 23, 1877, reissued No. 7,923, is for "an improvement in metallic cases for containing cooked meats," and, as he describes it,—

"Consists in a pyramidal-shaped can, having rounded corners, and both ends slightly flaring, to form shoulders, against which the head or end pieces rest. A. represents the body of my can made in the form of a truncated pyramid, with rounded corners, and of any desired number of sides, though I prefer to make with four sides. * * * In packing cooked meats it is done by means of a plunger through an aperture in the large head, b, which opening is afterwards hermetically sealed by means of a cap or plate d. * * * The can is to be opened at the larger end, at or near the shoulder, by means of a suitable can-opener, so that when the can is reversed, a slight tap on the smaller head will cause the solidly packed meat to slide out in one piece, so as to be readily sliced as desired."

The claims in controversy here are the first and third:

(1). "A can for packing food hermetically sealed and constructed of pyramidal form, with rounded corners and offset ends to support the heads, said heads being secured as shown and described."

(3). "As an improved article of manufacture, solid meat compressed and secured within a pyramid case or can, so that said can forms a mould for the meat, and permits its discharge as a solid cake, substantially as specified."

And to these claims defendants interpose two defenses:

(1). That the patent is void for want of novelty so far as the two features or claims in question are concerned.

(2). That defendants do not infringe.

It will be seen that the case or can covered by this patent must have certain features or characteristics:

(1). It must be of "pyramidal form, with rounded corners." (2). It may have "any number of sides," although the patentee "prefers four sides." (3). It must have "rounded corners," and the ends must be "slightly flaring," to form shoulders, against which the "head or end pieces rest."

There are some further details of construction, such as the mode of fastening in the heads by turning the flaring edges of the can inward over the flange of the head so as to make three thicknesses of metal, and, as he said, make a tight joint "with or without solder," and leaving an aperture or stud hole in the large head through which the meat is to be forced, which hole is to be closed by a cap. But as no notice is taken of these in the claims, we presume they are not considered as of the substance of the patent. By a stipulation filed in these cases, found on page 942 of defendants' record, it is admitted that "conical tin cans were made and used for canning alimentary substances, and sealed air-tight, prior to the date of the Wilson patents that are the subject of controversy in these cases."

The proof also shows that the French patent of one Emile Peltier was recorded in April, 1859, wherein he described pyramidal-shaped cans for the preservation of food, by hermetically sealing such cans. We may also add to this, from our common knowledge, the well-known glasses and moulds used by housekeepers in domestic life for preserving jellies, boned turkey, head cheese, etc., which were all, from the very necessity of the uses to which they are applied,

more or less flaring, conical or pyramidal in shape, and made so, presumably, for the purpose of turning out, or discharging, the contents in a solid cake. If, therefore, there was occasion, at the time this patentee entered the field of improvement, to use a pyramidal or conical-shaped can or case, there was no need to call in the aid of inventive genius to secure or contrive its construction. Those who wanted such a can or case had only to take those forms of cans then in general use, and adapt them, by mere mechanical changes, to the purpose for which they were designed. With these conical and pyramidal-shaped cans, well-known and described in the art of preserving food, there was not only no room, but absolutely no need, for invention in applying them to the purposes of preserving cooked meats. There is nothing in the proof showing, or tending to show, that cooked meats require any different shaped cans to contain or preserve them than do other alimentary substances. The only advantage gained by this shape, suggested in the patent, is that the solidly-packed meat can be more compactly turned out of this form of can in a a cake, so as to be readily sliced; but it could be equally well turned out of a conical can. In fact, a conical or pyramid-shaped or flaring can would seem naturally to suggest itself, from kindred uses in domestic life, almost as a part of the idea or suggestion of packing meat solidly in a can for preservation. To come within this claim of the patent, the can must not only be pyramidal in shape, but it must have "rounded corners" and "off-set ends to support the heads."

The cans shown in the proof to have been used by the St. Louis Beef Canning Company, and by Robert D. Hunter, and others, are eight-sided pyramidal-shaped cans; that is, they are made with four narrow sides or panels and four wider ones, while those used by the Chicago Packing and Provision Company are pyramidal-shaped cans with rounded corners. But this peculiarity of construction can hardly be

deemed the subject-matter of a patent. In making a pyramidal-shaped can of sheet metal it is obvious that the corners would be naturally more or less rounded, unless special pains were taken to avoid that shape, and turn the corners squarely; and with conical and pyramidal-shaped cans, known to the art, it would not seem to be invention to vary the form of construction by turning the corners with a curve instead of forcing the sheet metal forming the shell of the can into an angle more or less obtuse.

In his specifications describing the mode of constructing his can this patentee says: "Both ends of the body are made slightly flaring, so as to form shoulders or offsets, against which the heads are to rest." Waiving the question whether this feature of construction in a sheet-metal can could be the subject-matter of a patent, it is sufficient to say that we do not find this feature in the cans used by any of the defendants, while the complainants' cans put in evidence show that they do not confine themselves to this form of construction. All the defendants' cans which are shown as exhibits in the case are made by turning a rim of the head down over the outside of the body or shell of the can, and fastening the head in place with solder, and none of them have the "offset" ends called for by the specifications of this patent; and, as we have already said, this seems to be the form of construction practically adopted by the plaintiffs, probably because all packers find they can make a can just as tight and useful, and more cheaply, by turning the head over the outside of the shell, than by following the exact description of the patent. But we also find in the proof, that the cans shown to have been used by Gibbie and by Perl, as early as 1872, show the "offset" ends claimed by this patent. The "Gibbie" can has both the "rounded corners" and "offset ends," while the "Perl" can has the "offset ends" as a distinctive feature of construction. We have, therefore, conical and pyramid-

shaped cans, and the "Gibbie" and "Perl" cans, with flat sides, but rounded corners and "offset ends," known and in use long before this inventor entered the field, and we feel compelled to reach the conclusion that there was no novelty in the device of a pyramidal-shaped can with rounded corners and offset ends, as described in this claim. So that it seems clear to us that the first claim of this patent must be held void for want of novelty.

As to the third claim, the proof shows that Marshall packed meat solidly in a can in 1864. He says:

"I then subject a given quantity of the meat to pressure in a box or cylinder until all air is driven out, and the space occupied by the meat agrees with the size of the package it is intended to fill. When the meat is in its place the box is hermetically sealed, and in this state, retaining all its nutritive qualities, the meat will remain perfect as long as the package remains intact."

So Lyman, in his patent of 1870, described his process of packing meats solidly in cans, as follows:

"I grind or otherwise reduce the roughest parts to about the consistency of thick mortar or putty, and then pack the best pieces in this reduced meat, and press it all into a compact mass in the can, the interstices being filled with the reduced meat firmly pressed in, so as to expel the air, instead of filling them with the gravy or with water, as by the common modes. Sometimes I grind the whole of the meat and pack the can with it, compressing it into a solid mass, then heat and seal it up from the air, and re-heat it to conbine any free oxygen that may possibly be left in the can."

Here we have in both cases solid meats, and in one case cooked meats, packed in cans for preservation. Neither of these patentees tell us the shape of their cans. But we cannot see how, with conical and pyramidal cans well known in the art as packages for the preservation of meats and other food,

and the old arts of packing or compressing meats solidly into cans, there can be any invention which could be protected by a patent, in taking these well-known shaped cans and pressing into them cooked meat so as to form a solid mass or cake. The can was old and the meat cake was old.

The result is that the bills will be dismissed.

That part of the foregoing opinion relating to the William J. Wilson patent, was prepared by Judge Drummond; and that portion in reference to the John A. Wilson patent, by Judge Blodgett.—[Reporter.

THE HINSDALE DOYLE GRANITE CO. vs. THOMAS TILLEY *et al.*

Circuit Court—Northern District of Illinois—November, 1881.

In Equity.

Creditor's Bill against Municipal Corporation.—A creditor's bill can be maintained against a municipal corporation as a party defendant.

This was a creditor's bill filed by complainant against Thomas Tilley, the City of Chicago and others.

The City of Chicago demurred and claimed that a municipal corporation cannot be held to answer a creditor's bill.

C. A. Knight, in support of the demurrer.

This proceeding is in effect the same as garnishment, and the courts hold, and public policy requires, that municipal

corporations should be exempted from answering in mere proceedings to collect debts. *Merwin vs. Chicago*, 45 Illinois, 133; *Chicago vs. Halsey*, 25 do, 506; *Friebel vs. Colburn*, 64 do, 376; Dillon on Municipal Corporations, § 65. Also, the bill makes no allegation that there is money in the treasury of the city to pay this judgment, which the city could only be compelled to pay by *mandamus*.

H. M. Matthews, Contra.

At law, in the construction of garnishment statutes, there is no generally recognized principle of public policy exempting municipal corporations from their effect: *City of Newark vs. Funk*, 15 Ohio St. 462; *Hadley vs. Peabody*, 13 Gray, 200; *Bray vs. Wallingford*, 20 Connecticut, 416; *Whidden vs. Drake*, 5 New Hampshire, 13; *Wales vs. Muscatine*, 4 Iowa, 302; New York Procedure.

Equity jurisdiction is ancient and ample, and not limited by the construction given to garnishment acts: *Balch vs. Westall*, 1 Pierre Williams, 445; *Smithier vs. Lewis*, 1 Vernon, 398; *Stileman vs. Ashdown*, 2 Atkynson, 477; *Taylor vs. Jones*, 2 Atkynson, 602; *Pendleton vs. Perkins & City of St. Louis*, 49 Missouri, 565; *Lyell vs. Supervisors of St. Clair Co.*, 3 McLean, 580; *Singer & Talcott Stone Co. vs. Wheeler*, 6 Bradwell, 225. No execution against the city is asked by the bill, and no question about a *mandamus* can be raised by the demurrer.

Blodgett, J.—I have no doubt that this is a proper proceeding against the city. The decree would place the complainant in the shoes of the creditor of the city, and require the city to pay to complainant instead of Tilley.

The court has jurisdiction to entertain a creditor's bill of this kind, with a municipal corporation as party defendant, and I think the demurrer should be overruled.

Let the demurrer to the bill, by the city of Chicago, be overruled.

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ABANDONMENT OF VOYAGE—*See* ADMIRALTY, 11, 18.

ACTION.

1. BY INSURER AGAINST NEGLIGENT THIRD PERSON, MUST BE BROUGHT IN NAME OF ASSURED.—At common law, where insured property had been destroyed through the negligence of a third person, and the insurer had paid to the assured the amount of the insurance, he could not sue the wrong-doer in his own name, but must bring the action in the name of the assured and owner. *Presbyterian Society vs. Goodrich Trans. Co.*, 312.

2. WHERE INSURANCE WAS LESS THAN VALUE OF PROPERTY.—And though the insurance was less than the value of the property destroyed, there could not be two actions, but the liability of the wrong-doer, must be enforced in the name of the owner and assured. *Id.*

3. WISCONSIN CODE ALLOWS ONE JOINT BUT NOT SEPARATE ACTIONS.—The Wisconsin code does not give the insurer the right of a separate suit, but by the payment of the insurance, he acquires the right to join with the owner as party plaintiff in a suit to recover the whole loss against the wrong-doer. *Id.*

ADJOINING STATES—*See* ADMIRALTY, 9, 10.

ADMIRALTY—*See* CREDITOR'S BILL.

1. MARITIME SERVICE OR CONTRACT—TEST OF.—The true test of what constitutes a maritime contract or service is whether it is to be substantially performed or rendered on navigable waters. *Phœnix Ins. Co. vs. E. & W. Trans. Co.*, 18.

2. JURISDICTION—THROUGH BILLS OF LADING.—A contract was made for the shipment of grain from Chicago, by which it was agreed that the "Anchor Line" of propellers should carry the grain to Erie and there deliver it to the elevator company, as the agent of the consignee, for transhipment by rail to certain inland points in Pennsylvania. The bills of lading denoted a rate of freight charged for a continuous transportation service from the point of shipment to the inland points named, and provided that only that carrier should be liable for loss in whose actual custody the grain might

ADMIRALTY—*Continued.*

be at the time of loss: *Held*, that in the case of loss while the grain was in the course of water transit, the court of admiralty had jurisdiction of an action against the propeller company. *Id.*

3. PETITION TO LIMIT OWNER'S LIABILITY.—Each separate voyage or trip of a vessel is a separate venture, and the owners of the vessel cannot limit their personal liability, under the Act of Congress, as to any loss or damage except that occurring on the last voyage. The losses of different voyages cannot be grouped together and all the losers cited in to share what has been saved, and the owners exonerated from further liability. *The Alpena*, 436.

4. JURISDICTION—WHEN PETITION MAY BE FILED.—The District Court has jurisdiction to entertain a petition by the owners of a vessel for an apportionment of their interest in the vessel among the different sufferers, and the limitation of their liability under the Act of Congress, although at the time the petition was filed, no suit had been brought against them. *Id.*

5. LIABILITY FOR LOSS OF LIFE.—This limitation of liability applies to claims by the personal representatives of persons lost on the trip. *Id.*

6. UNLOADING VESSELS—WHEN TO BEGIN—USAGE.—By the usage at the port of Chicago, a consignee is entitled to twenty-four hours, or a full day, from the time the vessel arrives in which to furnish her with a dock, and commence unloading. *Mitchell vs. Langdon*, 527.

7. A CONSIGNEE is not obliged to commence unloading a vessel on Sunday; and when a vessel arrives in port on Saturday morning, the consignee need not begin unloading until Monday morning. *Id.*

8. DEMURRAGE—DELAY IN UNLOADING.—Where consignee unloaded a vessel from only one hatch at a time, it was *held* that this unreasonably delayed the unloading of the vessel, and entitled libellants to demurrage. *Id.*

9. EVIDENCE—BOUNDARIES OF STATES—§§ 4520 AND 4521, REVISED STATUTES.—Under these sections which provide that if a master employs seamen without shipping articles, for a voyage from a port in one state to a port in any other than an adjoining state, the seamen shall be entitled to the highest wages given during the preceding three months, at the port of shipment,—the court will take judicial notice of the legally established boundaries of the different states. *Thorson vs. Peterson*, 530.

10. ILLINOIS AND MICHIGAN ARE ADJOINING STATES within the meaning of such statutes, the boundary line being the middle of Lake Michigan. *Id.*

11. BREAKING UP OF VOYAGE OF SAILING VESSEL—RIGHTS OF SEAMEN.—When a sailing vessel is dismasted and rendered incapable of proceeding on her voyage, the voyage is broken up, and the sea-

ADMIRALTY—*Continued.*

men who contracted for the voyage are at liberty to leave as soon as the vessel has come into a port of safety, and if at the request of the master they remain with the vessel they are entitled to full wages, and cannot be held to a voyage contract. *Id.*

12. IMPLIED CONTRACT FOR WAGES.—When a mate has made several voyages with a vessel, at a certain rate per day, and goes upon another voyage without leaving the vessel, it will be presumed, in the absence of controlling proof of a new contract, that he goes upon the same terms as before. *Id.*

13. SEAMEN'S WAGES WHEN VOYAGE ABANDONED.—Where seamen have shipped late in the season for a trip on the lakes, and inclement weather prevents the completion of the voyage, the master has a right to discharge the crew, in absence of special contract, upon equitable terms, which in most cases would be the payment of their wages until the vessel is laid up, and their transportation to the port of shipment or destination. *The Zach Chandler*, 372.

14. SAILING RULES—DUTIES OF SAILING VESSEL AND STEAMER WHEN APPROACHING.—By the sailing rules, a sailing vessel, when approaching a steamer is bound to keep her course, and it is the duty of the approaching steamer to keep out of the way. *The Favorite*, 536.

15. STEAMER WITH TOWS IS BOUND BY THE RULES.—The fact that the steamer has barges in tow does not alter the rule. The steamer in such case should take extra and timely precautions to avoid the sailing vessel. *Id.*

16. COLLISION—NEGLIGENCE.—But little significance is to be attached to the manœuvres which are executed, or attempted on the part of a schooner, or a steamer, when in immediate proximity to each other, and in imminent danger of a collision. The material question is, whether there was any negligence, and by whom, in allowing the two vessels to come so close together as to bring on an impending collision. *Id.*

ADVERSE POSSESSION—*See* REAL ESTATE.

ANCILLARY SUIT—*See* CREDITOR'S BILL, 2.

ASSESSMENT OF NATIONAL BANK SHARES—*See* TAXATION OF NATIONAL BANKS.

ASSIGNEE IN BANKRUPTCY—*See* EMBEZZLEMENT.

ASSIGNMENT OF PATENT.

AMBIGUITY.—An assignment of all right, title and interest in letters patent "excepting thirty-two or thirty-three counties heretofore sold and assigned" is not necessarily void for ambiguity. *Washburn & Moen Man'f'g Co. vs. Haish*, 65.

ATTACHMENT—*See* FEDERAL JURISDICTION 3, 4.

LIABILITY OF SHERIFF FOR PROPERTY.—Where the sheriff re-delivered attached property to the defendant by direction of the plaintiff;

ATTACHMENT—*Continued.*

and prior to the dismissal of the suit, a second creditor—under the Indiana statute—became a party to the action: *Held*, that such second creditor could maintain an action against the sheriff for allowing the attached property to go from his control without an order of the court. *State ex rel. vs. Baldwin*, 165.

BANKRUPTCY—*See* EMBEZZLEMENT.

1. RIGHT OF ACTION.—Until an assignee of the bankrupt's estate is appointed, the bankrupt has the right to pursue all proper legal measures for the protection of his interests. *Myers vs. Callaghan*, 139.

2. RIGHT OF ASSIGNEE TO ENJOIN ACTION IN STATE COURT.—An assignee in bankruptcy cannot maintain a suit to set aside a void sale of his property by the bankrupt, and to enjoin the purchaser from prosecuting an action of trespass in the State Court against attaching creditors of the bankrupt, for seizing the goods sold, where the property has already come into the possession of the assignee and he is not a party to the proceedings in the State Court. *Main vs. Bromley*, 199.

3. EQUITY JURISDICTION—SUIT BY ASSIGNEE.—Where it was arranged between the bankrupts and another party that the assets of the bankrupts should be exclusively applied in the payment of one debt for which such other party was contingently liable, instead of applying them *pro rata* upon all the liabilities of the firm; and the assignee sought by proceedings in equity to charge such other person with the money and assets so used: *Held*, that the court of equity had jurisdiction. *Still vs. Solberg*, 252.

4. FRAUDULENT PREFERENCE.—Such application of the bankrupts' assets constitutes a fraudulent preference within the meaning of the Bankrupt Act. *Id.*

5. PREFERENCE—TRANSFER OF ASSETS TO INDORSER.—If, in advance of his liability being fixed, an indorser takes the bankrupt's property to meet the note which he has indorsed when it shall mature, or to secure himself against loss, he will be liable as accepting a preference. *Id.*

6. PARTNERSHIP AND INDIVIDUAL LIABILITY.—Where two partners signed an agreement, as individuals, to transfer certain property as security for a partnership liability, but failed to make the transfer, and subsequently became bankrupt; *held*, that such liability was not provable against the separate estate of one of the partners. *Gauss vs. Schrader*, 289.

7. GENERAL ORDER PROVIDING FOR DISCHARGE OF BANKRUPTS.—The District Court has the right to make an order providing that unless any bankrupt shall take the necessary steps to have the question of his right to a discharge ready to be determined on or before a certain date, any creditor might, without notice, move for a

BANKRUPTCY—*Continued.*

final order closing the case, and denying the discharge for want of timely application therefor. *In re Young*, 528.

8. TIMELY APPLICATION FOR DISCHARGE.—But if no such motion is made by a creditor and no order entered denying a discharge, the bankrupt has the right afterwards to apply for his discharge. *Id.*

9. PRACTICE—REFUSAL OF CLERK TO RECEIVE PETITION TO FILE.—If a bankrupt offers to file his petition for a discharge in due time, the refusal of the clerk to receive and file the petition will not prejudice his right, as then existing, to a discharge. *Id.*

BARBED WIRE FENCE—*See* PATENT LAW.

BEDSTEAD FRAMES—*See* PATENT LAW, 43, 44.

BENEFICIARY—*See* INSURANCE LAW, 10–12.

BILL OF REVIEW.

CONTROVERSY AS TO TITLE—FORECLOSURE.—The fact that the receiver of a railroad has filed a bill to set aside certain deeds of lands which he claims belongs to the railroad, and about which there is a controversy, is no ground for allowing a bill of review, upon petition of one of the bondholders, for the purpose of setting aside a decree for the sale of the road. The title to such lands cannot be determined in the foreclosure proceedings. *Loan & Trust Co. vs. G. B. & M. R. R. Co.*, 208.

BONDS—*See* SUPERSEDEAS BOND—MUNICIPAL BONDS.

BOUNDARIES OF STATES—*See* ADMIRALTY, 9, 10.

BURDEN OF PROOF—*See* EVIDENCE.

CANNED MEATS—*See* PATENT LAW, 45–48.

CARRIERS—*See* COMMON CARRIERS.

CHANCERY—*See* EQUITY PLEADING.

BANKRUPTCY—SUIT BY ASSIGNEE.—Where it was arranged between the bankrupts and another party that the assets of the bankrupts should be exclusively applied in the payment of one debt for which such other party was contingently liable, instead of applying them *pro rata* upon all the liabilities of the firm; and the assignee sought by proceedings in equity to charge such other person with the money and assets so used: *Held*, that the court of equity had jurisdiction. *Sill vs. Solbery*, 252.

CITIZENSHIP—*See* CORPORATIONS, 1–3.

1. CHANGE.—To effect a change of citizenship from one state to another, there must be an actual removal, an actual change of domicile, with a *bona fide* intention of abandoning the former place of residence and establishing a new one, and the acts of the party must correspond with such purpose. *Brockhaus vs. Kemna*, 128.

2. EVIDENCE—INTENTION OF PARTY.—And in such case it is competent for the party to testify to his purpose and intention as connected with his acts, where they are brought in question. *Id.*

CODE—*See* ACTION.

CODICIL—*See* WILLS, 4.
COLLISION—*See* ADMIRALTY, 16.
COLOR OF TITLE—*See* TITLE, 2, 3.
COMBINATION—*See* PATENT LAW.
COMITY BETWEEN COURTS—*See* FEDERAL JURISDICTION, 3—PATENT LAW, 6.

COMMON CARRIERS.

1. BILLS OF LADING—CONTRACTS.—H. & Co. shipped flour from Milwaukee to London under a contract which required the defendant to transport the flour by boat to Ludington, thence by rail to Portland, and from there by steamer to London. In an action to recover damages for delay of the flour at Portland, the plaintiffs claimed that the oral contract was that the flour should be shipped from Portland in the steamship "Argosy," but the bills of lading read, "upon the vessel called the Argosy (or other vessel of equal class for marine insurance.)" *Held*, that the bills of lading constituted the contract, and that the defendant had a right to ship on any vessel of equal class with the "Argosy" for marine insurance. *Hellwell vs. Grand Trunk Ry.*, 170.
2. CONDITION EXEMPTING CARRIER FROM LIABILITY FOR DELAYS.—The bills of lading contained a condition that the defendant should not be liable for delays, in transporting the flour, occasioned by over-pressure of freight: *Held*, that the insertion of this condition in the contract gave no greater exemption to the carrier than it was entitled to by law. *Id.*
3. OBLIGATION TO DELIVER WITHIN REASONABLE TIME.—In this transaction the obligations assumed by the defendant were the usual obligations of a common carrier, among which was that of transporting the flour to the place of consignment with all convenient dispatch, with such suitable and sufficient means as he is required to provide for his business. *Id.*
4. OVER ACCUMULATION OF BUSINESS—RESPONSIBILITY FOR DELAY OF TRANSPORTATION.—If at the time of making the contract for shipment, the carrier had no doubt, and if the condition of business on its lines gave it no ground for doubting that suitable means would be at its command within the usual and ordinary time for conveying the flour from Portland to London, and if all reasonable efforts were seasonably employed to obtain such means, and the delay was solely occasioned by an extraordinary and unusual influx of freight upon its lines, arising subsequently to the making of the contract, the carrier would not be responsible for the delay. *Id.*
5. LIABILITY OF CARRIER FOR DELAY.—But if at the time the contract of shipment was made, there was already an accumulation of business on the carrier's lines, which incapacitated it, or might reasonably be expected to incapacitate it for transporting the flour within a reasonable time, and this was then known to the carrier,

COMMON CARRIERS—*Continued.*

or might have been known by proper effort on its part, or if there were then reasonable grounds for belief on the part of the carrier that such was the state of the case at the time, then the carrier would be liable for the delay occasioned by such accumulation of business. *Id.*

6. DUTY OF CARRIER TO INFORM SHIPPER.—In such case it is the duty of the carrier to inform the shipper of the condition of business on its lines, and if it fails to do this and takes the freight in face of threatened inability to transport it with requisite dispatch, it will be held liable for the delay. *Id.*

7. RIGHT OF CARRIER TO BENEFIT OF INSURANCE.—A common carrier may, by contract with the shipper of goods, secure to itself, in case of any damage or loss to the goods, for which the carrier is liable, the benefit of any insurance to be effected by the shipper. *Phœnix Ins. Co. vs. E. & W. Trans. Co.*, 18.

8. IN SUCH CASE the payment of a loss by the insurer to the shipper does not give the former any right of action against the carrier. *Id.*

9. EFFECT OF STIPULATION AS TO INSURANCE—NEGLIGENCE.—It was stipulated in bills of lading that the carrier should not be liable for loss by perils of navigation, and that in case of loss for which the carrier should be liable, he should have the benefit of insurance effected by the insurers. A loss occurred, the proximate cause of which was the perils of navigation, but the remote cause was the negligence of the carrier. The insurer having paid the loss to the shippers, it was *held*, he was not subrogated to their rights against the carrier and could maintain no action against the latter. *Id.*

COMMON COUNTS—*See* CONTRACTS, 3.

CONCURRENT JURISDICTION—*See* JURISDICTION.

CONSIDERATION—*See* NOTES, BILLS AND CHECKS.

CONSOLIDATION OF CORPORATIONS—*See* CORPORATIONS, 1, 2.

CONSOLIDATION OF SUITS—*See* PRACTICE, 1, 2.

CONSTITUTIONAL LAW.

1. FIFTEENTH AMENDMENT—RIGHT OF CONGRESS TO LEGISLATE AS TO STATE ELECTIONS.—The authority of Congress to legislate upon the right of voting at state elections, under the fifteenth amendment to the Constitution, is limited to prohibitions against discriminations on account of race, color, or previous condition of servitude, by the United States, the states, and their officers or others claiming to act under color of laws which come within the prohibition of the amendment. *United States vs. Amsden*, 283.

2. IT DOES NOT EXTEND TO PUNISHMENT OF INDIVIDUALS acting upon their own responsibility, and not under color of law. *Id.*

3. ENFORCEMENT ACT—Section 5 of the Act of May 31, 1870, known as the "Enforcement Act," is not authorized by such amendment to the Constitution, and is unconstitutional and void. It lacks the

CONSTITUTIONAL LAW—*Continued.*

essential element of discrimination on account of race, etc. *Id.*

4. MUNICIPAL TAXATION—VALIDITY OF BONDS.—A Wisconsin statute authorised certain cities and towns to subscribe to the capital stock of a railroad company, but contained no restriction as to the amount of the subscription. It was provided, however, that the terms, conditions, and amount of such subscription should be previously set forth in a written proposition of the company, which should be submitted to the people, and approved by popular vote at an election duly called: *Held*, that such statute did not conflict with Section 3, Article 11, of the State Constitution, which declares it to be the duty of the Legislature to provide for the organization of cities and villages, "and to restrict their power of taxation," etc. *Smith vs. Fond du Lac*, 418.

5. WHEN FEDERAL COURT WILL NOT DECLARE STATE LAW UNCONSTITUTIONAL.—A Federal Court, in determining the rights of the parties under a state law, will not, in a doubtful case, declare such law to be in conflict with the State Constitution, unless sustained in so doing by a distinct adjudication of the Supreme Court of such state. *Id.*

6. *Foster vs. Kenosha*, 12 Wisconsin, 618, and *Fisk vs. Kenosha*, 26 Wisconsin, 23, examined and distinguished. *Id.*

CONSTRUCTION OF STATUTES.

COPYRIGHT STATUTES—CONSTRUED LIBERALLY—A claimant of a copyright must show that the provisions of the statutes on that subject have been complied with, but in view of what may be considered the inherent right of an author to his work, and the general object of the law, these provisions will receive a liberal construction. *Myers vs. Callaghan*, 189.

CONTRACTS.

1. EMPLOYER AND EMPLOYÉ—CONTRACTS AGAINST LIABILITY FOR NEGLIGENCE ARE VOID.—A contract between an employer and employé, by which the employé, in consideration of his employment, releases and discharges his employer from all liability for damages for injury or death of the employé, resulting from the negligence of his employer, is void as against public policy. *Roesner vs. Hermann*, 486.

2. CONTRACT TO EVADE PROCESS OF COURT IS VOID.—Defendants agreed with plaintiff to pay him a salary and his expenses while keeping himself without the jurisdiction of the court, in order to evade service of process: *Held*, that the agreement was void as against public policy and no recovery could be had thereon. *Bierbauer vs. Wirth*, 60.

3. MONEY EXPENDED AT REQUEST.—In such case the plaintiff could not recover his expenses as money expended at the request of the defendants. The law will go behind the request to unravel the transaction and discover its origin. *Id.*

CONTRACTS—*Continued.*

4. PAROL CONTRACTS OF INSURANCE are valid unless prohibited by statute. *Daniels vs. Citizens Ins. Co.*, 116.

5. CONSTRUCTION—BRAND OF GOODS.—A. contracted to deliver B. "75 boxes Kingan's Cumberland Cut Bacon," and the goods were warranted "to be of the choicest quality of grade and brand." Kingan & Co. put up two brands of bacon, marked respectively "Kingan's Packing Co. Cumberland Cut Bacon," and "Taylor's Cumberland Cut Bacon," both of equal quality; but at the place where the goods were delivered the former was considered as more choice: *Held*, that the contract called for the former brand. *Walker vs. Gooch*, 159.

6. KNOWLEDGE OF PARTIES.—The fact that the former brand was forwarded exclusively to an agent, and that the latter brand was in the general market, makes no difference unless both parties had knowledge of such fact. *Id.*

7. WARRANTY OF GOODS—SALE BY CONSIGNEE.—The contract provided that if the goods were not of the brand and grade called for, the "sale to be voided, and goods sold for account" of the vendors. The vendee had notice by bills of lading and invoices, of the brands of goods forwarded him, and paid the drafts drawn on him, received the goods and sold them for account of vendors. The court having *held*, that the goods delivered were not the ones contracted for: *Held*, further, that it was not the duty of consignee to refuse to receive the goods shipped, and that he was entitled to recover the difference between the proceeds of the goods and the price paid under the contract. *Id.*

8. BILLS OF LADING.—H. & Co. shipped flour from Milwaukee to London under a contract which required the defendant to transport the flour by boat to Ludington, thence by rail to Portland and from there by steamer to London. In an action to recover damages for delay of the flour at Portland, the plaintiffs claimed that the oral contract was that the flour should be shipped from Portland in the steamship "Argosy," but the bills of lading read, "upon the vessel called the Argosy (or other vessel of equal class for marine insurance.)" *Held*, that the bills of lading constituted the contract, and that the defendant had a right to ship on any vessel of equal class with the "Argosy" for marine insurance. *Helliwell vs. Grand Trunk Ry.*, 170.

9. CONDITION EXEMPTING CARRIER FROM LIABILITY FOR DELAYS.—The bills of lading contained a condition that the defendant should not be liable for delays, in transporting the flour, occasioned by over-pressure of freight: *Held*, that the insertion of this condition in the contract gave no greater exemption to the carrier than it was entitled to by law. *Id.*

10. OBLIGATION TO DELIVER WITHIN REASONABLE TIME.—In this

CONTRACTS—*Continued.*

transaction the obligations assumed by the defendant were the usual obligations of a common carrier, among which was that of transporting the flour to the place of consignment with all convenient dispatch, with such suitable and sufficient means as he is required to provide for his business. *Id.*

11. OVER ACCUMULATION OF BUSINESS—RESPONSIBILITY FOR DELAY OF TRANSPORTATION.—If at the time of making the contract for shipment, the carrier had no doubt, and if the condition of business on its lines gave it no ground for doubting that suitable means would be at its command within the usual and ordinary time for conveying the flour from Portland to London, and if all reasonable efforts were seasonably employed to obtain such means, and the delay was solely occasioned by an extraordinary and unusual influx of freight upon its lines, arising subsequently to the making of the contract the carrier would not be responsible for the delay. *Id.*

12. LIABILITY OF CARRIER FOR DELAY.—But if at the time the contract of shipment was made, there was already an accumulation of business on the carrier's lines, which incapacitated it, or might reasonably be expected to incapacitate it for transporting the flour within a reasonable time, and this was then known to the carrier, or might have been known by proper effort on its part, or if there were then reasonable grounds for belief on the part of the carrier that such was the state of the case at the time, then the carrier would be liable for the delay occasioned by such accumulation of business. *Id.*

13. DUTY OF CARRIER TO INFORM SHIPPER.—In such case it is the duty of the carrier to inform the shipper of the condition of business on its lines, and if it fails to do this and takes the freight in face of threatened inability to transport it with requisite dispatch, it will be held liable for the delay. *Id.*

14. DISAFFIRMANCE OF, BY INFANT—BRINGING SUIT.—The bringing suit by a daughter to recover the amount of a paid-up policy which had been paid to her father as guardian, would be a disaffirmance of all agreements, waiving her rights to the policy, entered into while a minor. *Heermans vs. Schmalts*, 888.

CONTROVERSY—*See* REMOVAL OF CAUSES.

CONVEYANCE OF PATENT—*See* ASSIGNMENT OF PATENT.

COPYRIGHT.

1. IN COURT REPORTS.—In the absence of any express legislation to the contrary, the reporter of court decisions is entitled to a copyright in his volumes of reports for whatever is the work of his own mind and hand. *Myers vs. Callaghan*, 139.

2. PUBLICATION.—The mere delivery of a number of copies to the state, is not necessarily a "publication" of a volume within the meaning of the statute as to copyrights. *Id.*

COPYRIGHT—*Continued.*

3. MISTAKE IN COMPLYING WITH STATUTE.—The title page of a volume was deposited with the clerk of the District Court in 1867, but the note printed in the volume stated by mistake that it was "entered according to act of Congress in the year 1866;" *Held*, that the copyright was not lost by the error. *Id.*

4. COPYRIGHT STATUTES—CONSTRUED LIBERALLY.—A claimant of a copyright must show that the provisions of the statutes on that subject have been complied with, but in view of what may be considered the inherent right of an author to his work, and the general object of the law, these provisions will receive a liberal construction. *Id.*

5. INFRINGEMENT.—Where the court can see that the head notes of the plaintiff's volumes have been freely used and copied from in the preparation of the defendants' volumes, it will hold the latter to be an infringement of the copyright of the former. *Id.*

6. BANKRUPTCY—RIGHT OF ACTION.—Until an assignee of the bankrupt's estate is appointed, the bankrupt has the right to pursue all proper legal measures for the protection of his interests. *Id.*

7. ABANDONMENT OF COPYRIGHT.—Before the court will find that a party has abandoned his copyright, the evidence should be reasonably conclusive of that fact. *Id.*

8. *Baker vs. Taylor*, 2 Blatchford, 82, commented upon. *Id.*

CORPORATIONS.

1. REMOVAL OF CAUSES—CITIZENSHIP OF CONSOLIDATED CORPORATIONS.—When a corporation created by the laws of one state, becomes consolidated with corporations of other states, and changes its name, and is sued by the new name in a court of the state of its creation, by another corporation of the same state, one of the consolidated corporations, created by another state, cannot go into the State Court and have the cause removed to the Federal Court. *C. & W. I. R. R. Co. vs. L. S. & M. S. Ry. Co.*, 122.

2. CONSOLIDATION OF CORPORATIONS.—The result of the consolidation of the various corporations is, that as to any one state, the corporation of that state is the sole representative of the other corporations. *Id.*

3. JOINT-STOCK COMPANY—CITIZENSHIP—FEDERAL JURISDICTION.—A joint-stock company possessing the right by the law of the state where it is organized, to sue and be sued in the name of its president or treasurer, is a citizen of that state, in the same sense that corporations are citizens of the state under whose laws they are organized; and such joint-stock company may sue and be sued in the name of such officers in the Federal Courts, as a citizen of that state, without regard to the citizenship of the shareholders of the company. *Fargo vs. L., N. A. & C. Ry. Co.*, 273.

CORPORATIONS—*Continued.*

4. If the essential franchises of a corporation are conferred upon a joint-stock company, it is none the less a corporation for being called something else. *Id.*

COSTS.

Where a defendant has persistently fought the validity of complainant's patent and the question of infringement as well as the amount of damages, the court will award all the costs against the defendant. *Calkins vs. Bertrand.* 445.

COURT REPORTS—*See* COPYRIGHT.

CREDITOR'S BILL.

1. FEDERAL JURISDICTION.—A creditor's bill cannot be maintained in the United States Circuit Court, in aid of an execution on a money decree recovered in the District Court in admiralty, or for enforcement or collection of such decree, when all the parties to the bill are citizens of the same state. *Winter vs. Swinburne,* 454.

2. ANCILLARY SUIT.—Jurisdiction in such case cannot be sustained on the ground that the bill in the Circuit Court is ancillary to the judgment or decree of the District Court, and a mere continuation of the proceedings in that court, nor on the ground that it arises under the Constitution and laws of the United States. *Id.*

3. "REMOVAL ACT" CONSTRUED—JURISDICTION.—Though the jurisdiction in admiralty is given by the Federal laws and Constitution, a creditor's bill to enforce a money decree in admiralty, is not a case "arising under the Constitution or laws of the United States," within the meaning of the first clause of the first section of the Removal Act of March 3, 1875. *Id.*

4. JOINDER OF COMPLAINANTS IN CREDITOR'S BILL.—Two separate judgment creditors may unite in a creditor's bill to reach property fraudulently conveyed away by their common debtor. *Sheldon vs. Keokuk, N. L. Packet Co.,* 470.

5. JOINDER OF DEFENDANTS.—Where a creditor's bill charges that the judgment debtor by fraud and collusion has disposed of separate portions of his property to different persons in execution of a scheme to strip the debtor of all his property which could be levied upon, it is proper to join all the grantees as defendants in one bill. *Id.*

6. JOINDER OF CAUSES OF ACTION IN ONE SUIT.—As a general rule, the court will not compel parties to incur the expense, vexation and delay of several suits, where the transactions constituting the subject of the litigation, or out of which the litigation arises, are so connected by their circumstances as to render it proper and convenient that they should be examined in the same suit, and full relief given by one comprehensive decree. *Id.*

7. AGAINST MUNICIPAL CORPORATION.—A creditor's bill can be maintained against a municipal corporation as a party defendant. *Granite Co. vs Tilley,* 572.

CRIMINAL LAW.

1. NATIONAL BANKS—FALSE ENTRIES.—The word "false," as used in Section 5209, United States Revised Statutes, which provides that any officer of a National Bank making a false entry in any report, etc., means willfully and intentionally false, and with intent to deceive,—a mistake in the amount of an item, would not make a man guilty under the law. *U. S. vs. Allen*, 90.
2. REPORTS—RESPONSIBILITY OF OFFICER MAKING.—Officers of National Banks who assume to make reports called for under the law must be held responsible civilly and criminally for the statements made in these reports. The officer cannot be heard to say that he did not know what was in the reports made and sworn to by him in the exercise of his duty under the law. *Id.*
3. GOOD REPUTATION.—If the evidence leaves the question of criminal intent in doubt, proof of good reputation may solve that doubt in favor of the defendant. *Id.*
4. EMBEZZLEMENT—ASSIGNEE IN BANKRUPTCY.—An assignee in bankruptcy cannot be convicted of embezzlement under section 5504 of the Revised Statutes. *United States vs. Bixby*, 238.
5. SCOPE OF SECTION 5504 OF REVISED STATUTES.—Under that section an officer can only be guilty of embezzling such moneys as he is required to deposit with the Treasurer, Assistant Treasurer, or a designated depository of the United States, in the name and to the credit of the court. *Id.*
6. CONVERSION OF TRUST FUNDS BY ASSIGNEE.—There is no statute making it embezzlement for an assignee in bankruptcy to convert to his own use trust funds which come into his hands. *Id.*
7. PENSION LAW—ILLEGAL FEES.—Section 5485, U. S. Revised Statutes, provides a penalty for any person receiving a greater compensation for obtaining a pension, "than is provided in the Title pertaining to pensions"; under that title (Sec. 4785) the Commissioner of Pensions was authorized to allow a fee of not exceeding $25, for prosecuting a claim. By act of June 20, 1878, section 4785 was repealed and the reception of a greater sum than $10, for procuring a pension made unlawful: *Held*, that the provisions of section 5485, relating to the offense of charging illegal fees, obtain and apply to violations of the act of June 20, 1878. *United States vs. Dowdell*, 483.

CULTIVATORS—*See* PATENT LAW, 49–53.

DEMURRAGE—*See* ADMIRALTY.

DEMURRER—*See* DEMURRER TO EVIDENCE—EQUITY PLEADING, 5–7.

DEMURRER TO EVIDENCE.

1. WHEN ALLOWED—The party upon whom rests the burden of proof in the trial of a fact before the jury, cannot demur to the evidence of the adverse party. *Pickel vs. Isgrigg*, 230.
2. FACTS ADMITTED BY DEMURRER—RECORD.—A demurrer to evidence

DEMURRER TO EVIDENCE—*Continued.*
must distinctly admit on the record every fact which there was any evidence tending to prove, so that the court will have nothing to do but to apply the law to the established facts.
DISCLAIMER—*See* PATENT LAW.
DISCRIMINATION ON ACCOUNT OF RACE—*See* CONSTITUTIONAL LAW, 1-3.
DISMISSAL OF CAUSE—*See* PRACTICE, 2.
DOMICILE—*See* CITIZENSHIP.
DOWER.
GOVERNMENT GRANT—TITLE TO LAND BEFORE PATENT ISSUES—Where the Government agrees to grant certain land, and the land is located and surveyed and the boundaries established before the issuing of the patent, the wife of the grantee is thereby clothed with an inchoate right of dower, which becomes consummate on his death, although the patent is not issued till subsequently. *Ah-kum* vs. *Sorin*, 298.
EMBEZZLEMENT.
1. ASSIGNEE IN BANKRUPTCY.—An assignee in bankruptcy cannot be convicted of embezzlement under section 5504 of the Revised Statutes. *United States vs. Bixby*, 238.
2. SCOPE OF SECTION 5504 OF REVISED STATUTES.—Under that section an officer can only be guilty of embezzling such moneys as he is required to deposit with the Treasurer, Assistant Treasurer, or a designated depository of the United States, in the name and to the credit of the court. *Id.*
3. CONVERSION OF TRUST FUNDS BY ASSIGNEE.—There is no statute making it embezzlement for an assignee in bankruptcy to convert to his own use trust funds which come into his hands. *Id.*
ENFORCEMENT ACT—*See* CONSTITUTIONAL LAW, 1-3.
EQUITY PLEADING.
1. MULTIFARIOUSNESS.—Whether or not a bill in equity is objectionable on the ground of multifariousness, depends upon the particular circumstances of each case. *Sheldon* vs. *Keokuk N. L. Packet Co.*, 470.
2. JOINDER OF CAUSES OF ACTION IN ONE SUIT.—As a general rule the court will not compel parties to incur the expense, vexation and delay of several suits, where the transactions constituting the subject of the litigation, or out of which the litigation arises, are so connected by their circumstances as to render it proper and convenient that they should be examined in the same suit, and full relief given by one comprehensive decree. *Id.*
3. JOINDER OF COMPLAINANTS IN CREDITOR'S BILL.—Two separate judgment creditors may unite in a creditor's bill to reach property fraudulently conveyed away by their common debtor. *Id.*
4. JOINDER OF DEFENDANTS.—Where a creditor's bill charges that

EQUITY PLEADING—*Continued.*

the judgment debtor by fraud and collusion has disposed of separate portions of his property to different persons in execution of a scheme to strip the debtor of all his property which could be levied upon, it is proper to join all the grantees as defendants in one bill. *Id.*

5. LACHES—STATUTE OF LIMITATIONS—DEMURRER.—If the doctrine of *laches* can ever be applied in a suit in equity, as to the bringing of which there is a statute of limitations, a demurrer insisting upon a lapse of time short of the statutory period will not be sustained unless the bill upon its face, without resorting to inferences, makes a clear case of unreasonable delay. *Id.*

6. The defense of the statute of limitations may be taken advantage of on demurrer to a bill in equity. *Id.*

7. ALLEGATION OF FRAUD—DEMURRER OF STATUTE OF LIMITATIONS.—It will not be inferred in support of a demurrer setting up the statute of limitations, from the fact that the alleged fraud occurred more than six years prior to the commencement of the suit, that the complainants discovered the fraud six years prior. *Id.*

8. RULE 66.—A suit will not be dismissed under the sixty-sixth rule in equity for want of a replication to an amended answer, where a motion is pending to strike such answer from the files for irregularity and insufficiency. *Allis vs. Stowell*, 57.

EQUITY PRACTICE—*See* PRACTICE, 5.

ESTOPPEL—*See* INSURANCE LAW, 13, 14—PATENT LAW, 12—TITLE, 8.

EVASION OF PROCESS—*See* CONTRACTS, 2, 3.

EVIDENCE—*See* DEMURRER TO—ADMIRALTY, 9, 10.

1. EXPERT TESTIMONY.—The testimony of an accountant who has examined the books of a bank is competent evidence as to the facts thus ascertained by him. *U. S. vs. Allen*, 90.

2. GOOD REPUTATION.—If the evidence leaves the question of criminal intent in doubt, proof of good reputation may solve that doubt in favor of the defendant. *Id.*

3. INSURANCE—OPEN POLICY.—Where in order to evade the laws of Ohio, an insurance company issued an open policy to its general agents to cover all risks indorsed thereon or certified to be covered thereby, and its local agents in Ohio placed insurance which was covered by said policy, but which ran in their own names, it was *held* that the party actually insured could show by parol that the insurance was taken out for his benefit, and could maintain an action in his own name against the insurance company for the amount of insurance in case of loss. *Daniels vs. Citizens' Ins. Co.*, 116.

4. CHANGE OF CITIZENSHIP.—To effect a change of citizenship from one state to another, there must be an actual removal, an actual change of domicile, with a *bona fide* intention of abandoning the former

EVIDENCE—*Continued.*

place of residence and establishing a new one, and the acts of the party must correspond with such purpose. *Kemna vs. Brockhaus*, 128.

5. EVIDENCE—INTENTION OF PARTY.—And in such case it is competent for the party to testify to his purpose and intention as connected with his acts, where they are brought in question. *Id.*

6. PATENTS—INFRINGEMENT—PROFITS—BURDEN OF PROOF.—In a suit to recover the profits made by an infringement of a patent for an improvement in machines, the burden is on the complainant to separate profits due to the improvement from the general profits of the business; and if he fails to show what proportion, if any, of the whole profits was produced by his improvement, he can only recover a nominal amount. *Kirby vs. Armstrong*, 135.

7. ABANDONMENT OF COPYRIGHT.—Before the court will find that a party has abandoned his copyright, the evidence should be reasonably conclusive of that fact. *Myers vs. Callaghan*, 139.

8. DEFEAT OF PATENT FOR PRIOR USER.—In order to defeat a patent on the ground of user of the patented article, prior to the issuance of the patent, it must be shown that the article so relied upon as a defense, was complete and capable of producing the result attained by the patented article, and the burden of proof rests upon the one seeking to overthrow the patent. Every reasonable doubt should be resolved in favor of the patentee. *Washburn & Moen Man'f'g Co. vs. Haish*, 65.

9. PROMISSORY NOTES—INDORSEMENT—CONSIDERATION—EVIDENCE.—An indorser of a promissory note, indorsed in order to perfect an agreement between the maker and the indorsee, may show by parol evidence, as against his indorsee, that he indorsed the note without consideration, and that he was not an accommodation indorser. *National Bank vs. Brush*, 188.

10. REAL PARTY IN INTEREST.—Extrinsic evidence is admissible to show who is the real party in a suit prosecuted or defended in the name of a nominal party, and the real party in interest is bound by the judgment equally as though he was a party of record. *Claflin vs. Fletcher*, 281.

11. REPLEVIN—RES JUDICATA.—Judgment in a replevin suit brought to obtain possession of goods is conclusive as to the ownership in an action between the same parties, to recover the value of the goods. *Id.*

12. PRESUMPTION.—Evidence of adverse possession is always to be construed strictly, and every presumption is to be made in favor of the true owner. *Heermans vs. Schmaltz*, 323.

13. VERBAL ADMISSIONS—ADMISSIBILITY AFTER DEATH.—Verbal admissions by the adverse claimant that he entered into possession under a contract, and that he had never paid anything on the

EVIDENCE—*Continued.*

same, are not rendered inadmissible in evidence after his death, by sections 4069 and 4070, Revised Statutes of Wisconsin. *Id.*

EXPERT TESTIMONY.

BANK BOOKS.—The testimony of an accountant who has examined the books of a bank is competent evidence as to the facts thus ascertained by him. *U. S. vs. Allen*, 90.

EXPRESS TRUSTS, CREATION OF—*See* TRUSTS.

FEDERAL JURISDICTION.

1. EFFECT OF STATE STATUTE.—The fact that a state statute may provide that all actions of a particular character arising within its limits, shall be brought in a certain State Court, will not affect the jurisdiction of Federal Courts in such actions, if they would otherwise have jurisdiction. *Davis vs. James*, 51.

2. MORTGAGE BY GUARDIAN—FORECLOSURES.—A state statute which provides that guardians may mortgage the estates of their wards in certain cases, but that foreclosure of such mortgage shall only be made by petition to certain State Courts, does not affect the right of the mortgagee to foreclose such mortgage in the Federal Court, when that court would otherwise have jurisdiction on account of the citizenship of the parties. *Id.*

3. JOINT-STOCK COMPANY—CITIZENSHIP.—A joint-stock company possessing the right by the law of the state where it is organized, to sue and be sued in the name of its president or treasurer, is a citizen of that state, in the same sense that corporations are citizens of the states under whose laws they are organized; and such joint-stock company may sue and be sued in the name of such officer in the Federal Courts, as a citizen of that state, without regard to the citizenship of the shareholders of the company. *Fargo vs. L., N. A. & C. Ry. Co.*, 273.

4. COMITY BETWEEN COURTS.—The defendant, Sheriff of Rock Island County, Illinois, seized a certain horse by virtue of a writ of attachment issued out of the State Court. The plaintiff, claiming property in the horse, instituted a replevin suit in the Federal Court. The defendant pleaded property in another person, and the case was tried on its merits and issue found for plaintiff. *Held*, that it was too late after trial to deny the jurisdiction of the Federal Court, on the ground that the State Court had acquired prior jurisdiction and that the right of property must be settled there under the state statute. *Gilman vs. Wheelock*, 480.

5. REMOVAL OF CAUSE—ATTACHMENT SUIT.—A party who has interpleaded under the statute of Illinois in an attachment suit, can, if he is a citizen of another state, have the cause removed to the Federal Court. *Id.*

6. CREDITOR'S BILL.—A creditor's bill cannot be maintained in the United States Circuit Court, in aid of an execution on a money

FEDERAL JURISDICTION—*Continued.*

decree recovered in the District Court in admiralty, or for enforcement or collection of such decree, when all the parties to the bill are citizens of the same state. *Winter vs. Swinburne*, 454.

7. ANCILLARY SUIT.—Jurisdiction in such case cannot be sustained on the ground that the bill in the Circuit Court is ancillary to the judgment or decree of the District Court, and a mere continuation of the proceedings in that court, nor on the ground that it arises under the Constitution and laws of the United States. *Id.*

8. "REMOVAL ACT" CONSTRUED.—Though the jurisdiction in admiralty is given by the federal laws and Constitution, a creditor's bill to enforce a money decree in admiralty is not a case "arising under the Constitution or laws of the United States," within the meaning of the first clause of the first section of the Removal Act of March 3, 1875. *Id.*

FIFTEENTH AMENDMENT, CONSTRUCTION OF—*See* CONSTITUTIONAL LAW, 1-3.

FORFEITURE OF INSURANCE POLICY—*See* INSURANCE LAW, 13, 14.

FORMER JUDGMENT—*See* RES JUDICATA.

GARNISHMENT—*See* REMOVAL OF CAUSES, 7, 8.

GOOD FAITH—*See* INSURANCE LAW, 2.

HAY-RAKES—*See* PATENT LAW, 55-59.

HORSE-SHOES—*See* PATENT LAW, 60.

INDIAN TITLE—*See* TITLE, 4-6.

INDIAN WOMAN—*See* STATUTE OF LIMITATIONS, 2.

INFANCY—*See* INSURANCE LAW, 12.

INFRINGEMENT—*See* PATENT LAW.

INJUNCTIONS—*See* TAXATION OF NATIONAL BANK SHARES—BANKRUPTCY, 2.

INSURANCE LAW.

1. OPEN POLICY—RIGHT OF ACTION—EVIDENCE.—Where in order to evade the laws of Ohio, an insurance company issued an open policy to its general agents to cover all risks indorsed thereon or certified to be covered thereby, and its local agents in Ohio placed insurance which was covered by said policy, but which ran in their own names, it was *held* that the party actually insured could show by parol that the insurance was taken out for his benefit, and could maintain an action in his own name against the insurance company for the amount of insurance in case of loss. *Daniels vs. Citizens' Ins. Co.*, 116.

2. UNDERWRITERS ARE HELD TO THE UTMOST GOOD FAITH in making out policies for those who deal with them. *Id.*

3. PAROL CONTRACTS OF INSURANCE are valid unless prohibited by statute. *Id.*

4. ACTION BY INSURER AGAINST NEGLIGENT THIRD PERSON MUST BE BROUGHT IN NAME OF ASSURED.—At common law, where

INSURANCE LAW—*Continued.*

insured property had been destroyed through the negligence of a third person, and the insurer had paid to the assured the amount of the insurance, he could not sue the wrong-doer in his own name, but must bring the action in the name of the assured and owner. *Presbyterian Society vs. Goodrich Trans. Co.*, 312.

5. WHERE INSURANCE WAS LESS THAN VALUE OF PROPERTY.—And though the insurance was less than the value of the property destroyed, there could not be two actions, but the liability of the wrong-doer, must be enforced in the name of the owner and assured. *Id.*

6. WISCONSIN CODE ALLOWS ONE JOINT BUT NOT SEPARATE ACTIONS.—The Wisconsin code does not give the insurer the right of a separate suit, but by the payment of the insurance, he acquires the right to join with the owner as party plaintiff in a suit to recover the whole loss against the wrong-doer. *Id.*

7. RIGHT OF CARRIER TO BENEFIT OF INSURANCE.—A common carrier may, by contract with the shipper of goods, secure to itself, in case of any damage or loss to the goods, for which the carrier is liable, the benefit of any insurance to be effected by the shippers. *Phœnix Ins Co. vs. E. & W. Trans. Co.*, 18.

8. In such case the payment of a loss by the insurer to the shippers does not give the former any right of action against the carrier. *Id.*

9. EFFECT OF STIPULATION AS TO INSURANCE—NEGLIGENCE.—It was stipulated in bills of lading that the carrier should not be liable for loss by perils of navigation, and that in case of loss for which the carrier should be liable, he should have the benefit of insurance effected by the insurers. A loss occurred, the proximate cause of which was a peril of navigation, but the remote cause was the negligence of the carrier. The insurer having paid the loss to the shippers, it was *held* he was not subrogated to their rights against the carrier and could maintain no action against the latter. *Id*

10. LIFE INSURANCE—PAID-UP POLICY—BENEFICIARY—VESTED INTEREST.—Where a father took out a policy of insurance upon his life, issued upon the endowment plan, and payable to his daughter, and subsequently on account of failing circumstances, exchanged such policy for a paid-up policy, also payable to his daughter, it was *held*, that the daughter had a vested interest in the paid-up policy and the proceeds thereof. *Brockhaus vs. Kemna*, 338.

11. SAME—INFANT BENEFICIARY—WAIVER OF RIGHTS—VOIDABLE CONTRACT.—The fact that the daughter, being a minor at the time, agreed, prior to the exchange of policies, that the proceeds of the paid-up policy should be placed in the hands of a trustee, and used for her benefit jointly with her sisters, would not effect the vested interest of such daughter in the proceeds and her sole right

INSURANCE LAW—*Continued.*

thereto, where such agreement did not constitute the substantial consideration for the exchange of the policies. *Id.*

12. DISAFFIRMANCE OF CONTRACT BY INFANT—BRINGING SUIT.—The bringing suit by the daughter to recover the amount of the paid-up policy which had been paid to her father as guardian, would be a disaffirmance of all agreements, waiving her rights to the policy, entered into while a minor. *Id.*

13. RIGHT TO PAID-UP POLICY—FORFEITURE—SIXTY DAYS' DEFAULT.—The plaintiff was the holder of an endowment life insurance policy, issued by the defendant company, which provided that in case of default in payment of any premium, after two full years' payments had been made, the policy might be exchanged for a paid-up policy for a certain amount, subject to the condition that the policy duly receipted "shall have been transmitted to and received by the company within 60 days after such default." *Held, first*, that though in case of default in payment of premium and no offer to surrender the original policy for a paid-up policy until a year and a half afterwards, the failure to transmit the policy within 60 days after default, would in the absence of excusing circumstances involve the loss of the right to a paid-up policy. *Coffey vs. Universal Life Ins. Co.*, 354.

14. ESTOPPEL OF COMPANY TO SET UP FORFEITURE.—*Second*, yet where the company had refused by its agent to accept the premium on the day it was due, on account of proceedings against it for dissolution and appointment of a receiver, and had not notified the plaintiff to pay the premium elsewhere, and had refused to give him information, and had informed him that his policy had wholly lapsed and could not be revived until after the end of the court proceedings, if at all, the company are estopped from setting up the failure to transmit the policy within 60 days after default in payment of premium, as a forfeiture of the right to a paid-up policy. *Id.*

INVENTION—*See* PATENT LAW.

JOINDER OF ACTIONS—*See* EQUITY PLEADING, 2. INSURANCE LAW 4–6.

JOINDER OF DEFENDANTS—*See* EQUITY PLEADING, 4.

JOINDER OF PLAINTIFFS—*See* EQUITY PLEADING, 3.

JOINT STOCK COMPANY—*See* CORPORATIONS, 3–4.

JUDGMENT—*See* RES JUDICATA.

JUDICIAL SALE—*See* MORTGAGES, 4—SHERIFF'S SALE.

JUDICIAL NOTICE—*See* ADMIRALTY, 9–10.

JURISDICTION—*See* FEDERAL JURISDICTION.

1. CONFLICT OF—SERVICE OF PROCESS—FORECLOSURE OF MORTGAGE.—A bill was filed in the State Court to enjoin the foreclosure of a mortgage, and to have it set aside and declared void. Later, but

JURISDICTION—*Continued.*

on the same day, a bill was filed in the United States Court to foreclose the mortgage. The process from the United States Court was first served: *Held*, that the fact that the process of the United States Court was first served gave that court jurisdiction to go on with the foreclosure suit and determine all questions as to the validity of the mortgage. *U. M. L. Ins. Co. vs. Chicago University*, 191.

2. POWER OF FEDERAL COURT TO RESTRAIN PROCEEDINGS IN STATE COURT.—*It seems*, that in such a case the United States Court has the power to prevent any of the parties before it from proceeding in the State Court suit and raising the question there whether the mortgagor had the right to execute the mortgage and whether he would be estopped by the decree in the former court. *Id.*

LACHES—*See* EQUITY PLEADING, 5.

LIFE INSURANCE—*See* INSURANCE LAW, 10-14.

MANDAMUS.

1. COLLECTION OF JUDGMENTS—ANNUAL TAX—WAIVER.—Relator recovered judgments against the city of Galena for $25,000. At the time the judgments were rendered the law gave him the right to insist upon the annual levy of a tax of one per cent. to apply upon the principal and the same per cent. to apply upon the interest of his judgments. Upon petition for a *mandamus* fifteen years after the date of the judgments: *Held*, that the court would not compel the levy and collection of sufficient taxes in one year to extinguish the whole indebtedness, and that by not enforcing his right to the annual tax, the relator waived it as to the years past, and could now only require the levy of a one per cent. annual tax to apply on the principal and a one per cent. annual tax to apply on the interest, until the whole indebtedness was paid. *United States ex rel. vs. Galena*, 263.

2. JUDGMENTS AGAINST TOWN—PAYMENT—DEMAND.—Where a series of judgments have been rendered against a town, and for a number of years no action has been taken by the town authorities to provide for their payment, a *mandamus* will be issued against such town authorities to compel them to levy a tax to pay the judgments, although no formal demand for their payment has been made. *United States ex rel. vs. Town of Brooklyn*, 466.

MEASURE OF DAMAGES—*See* PATENT LAW, 20 *et seq.*

MONEY EXPENDED AT REQUEST—*See* CONTRACT, 8.

MORTGAGES.

1. REDEMPTION FROM SALE UNDER POWER IN TRUST DEED.—Under a clause in a trust deed, the entire debt was declared due, for nonpayment of an installment of interest, and the property sold by the trustee, after publication notice, for less than one-third its value, and for a smaller amount than the mortgage debt, it being

MORTGAGES—*Continued.*

bid in by the holder of the note, who prior to the sale had given the mortgagor to understand that when sold the property would be held merely as a security for the balance of the debt, and that he would have the right to make disposition of the property, using the proceeds to satisfy the balance due. After the sale the holder refused to carry out this arrangement: *Held*, that the mortgagor was entitled to redeem, on paying the full amount of the indebtedness, interest and taxes. *Stinson vs. Pepper*, 107.

2. FORECLOSURE OF RAILROAD MORTGAGE—SALE—PAYMENT WITH BONDS—PROVISIONS IN MORTGAGE.—Provisions in a railroad mortgage, that in case the trustee should sell the mortgaged property upon default of payment, the mortgage bonds should be received, at a rate to be fixed in a certain manner, as part of the purchase price, do not bind the court, if foreclosure proceedings are instituted and a sale is made under its direction. *Loan & Trust Co. vs. G. B. & M. R. R. Co.*, 203.

3. VALUE OF BONDS RECEIVED IN PAYMENT—WHEN FIXED.—Where in the foreclosure of a railroad mortgage the court decrees that at the sale, the mortgage bonds may be received in part payment of the purchase price, it is not necessary nor customary to fix the value of such bonds, prior to the confirmation of the sale. *Id.*

4. JUDICIAL SALE—DEVISEES—PARTIES.—Wm. F. Johnson owned in fee the undivided half of land, and made an ordinary trust deed with power of sale to John V. LeMoyne, and afterward sold and conveyed the land to John A. Washington, subject to the trust deed. Washington died testate in 1861, providing that his real estate should be equally divided among his children, as they should become of age, and until then they were to be maintained and educated out of the proceeds arising from it. The executor was empowered to sell the land in such manner and on such terms as to him should seem best for the interest of the children and reinvest the proceeds. In 1864, Susan C. Williams, the payee and holder of the bond, filed a bill to foreclose said trust deed, against LeMoyne as trustee, and the executor of the will of Washington, who were the only defendants, alleging that the trustee was unwilling to execute the trust without an order of court. *Chew vs. Hyman*, 240.

5. FEE TO EQUITY OF REDEMPTION.—The court ordered the premises sold, which was done and the surplus proceeds paid to the executor: *Held*, that by the will of John A. Washington the fee to the equity of redemption was vested in his children. *Id.*

6. THE SALE A JUDICIAL ONE—PARTIES.—That under the circumstances of the case, the sale made under the decree was to be regarded as a judicial sale by the court, and not as a sale made under the power contained in the trust deed, and being a judicial sale, the

MORTGAGES—*Continued.*
owners of the fee burdened with the indebtedness were necessary parties to the suit. *Id.*
7. FORTY-NINTH RULE—FEE NOT IN EXECUTOR.—That the fee of the land was not vested in the executor so as to make the 49th rule applicable. *Id.*
8. EXECUTOR—EXERCISE OF POWER—RATIFICATION.—The executor being only empowered to sell for the purpose of re-investment could not ratify a sale not made by himself under the power so as to bind the devisees under the will. *Id.*
9. NO UNDUE DELAY—LACHES.—All of the complainants being minors at the time of the proceedings, under the circumstances there was no undue delay in bringing suit. *Id.*
10. REDEMPTION.—*Held, further*, that the heirs at law were entitled to redeem the premises upon equitable terms. *Id.*
11. FEDERAL JURISDICTION—MORTGAGE BY GUARDIAN—FORECLOSURE.—A state statute which provides that guardians may mortgage the estates of their wards in certain cases, but that foreclosure of such mortgages shall only be made by petition to certain State Courts, does not affect the right of the mortgagee to foreclose such mortgage in the Federal Court, when that court would otherwise have jurisdiction on account of the citizenship of the parties. *Davis vs. James*, 51.
MULTIFARIOUSNESS—*See* EQUITY PLEADING, 1.
MUNICIPAL BONDS.
1. RECITALS—VALIDITY—BONA FIDE HOLDERS.—Municipal bonds which contain no recitals showing that they are issued in pursuance of legislative authority, and in the manner prescribed by it are not unimpeachable in the hands of *bona fide* holders. Such bonds are not commercial paper. *Hopper vs. Covington*, 488.
2. NECESSARY ALLEGATIONS IN COMPLAINT.—In an action on municipal bonds the plaintiff must show in his complaint, either that the bonds contain such recitals as would preclude the municipality from impeaching their validity, or else that they were issued in substantial compliance with the law authorizing them, and for a proper purpose. *Id.*
3. CONSTITUTIONAL LAW—TAXATION—VALIDITY OF BONDS.—A Wisconsin statute authorized certain cities and towns to subscribe to the capital stock of a railroad company, but contained no restriction as to the amount of the subscription. It was provided, however, that the terms, conditions, and amount of such subscription should be previously set forth in a written proposition of the company, which should be submitted to the people, and approved by popular vote at an election duly called: *Held*, that such statute did not conflict with Section 3, Article 11, of the State Constitution, which declares it to be the duty of the Legislature

MUNICIPAL BONDS—*Continued.*
to provide for the organization of cities and villages, "and to restrict their power of taxation," etc. *Smith vs Fond du Lac*, 418.
MUNICIPAL CORPORATIONS—*See* MUNICIPAL BONDS.
1. JUDGMENTS—LIMITATION OF LIENS.—The power of the court to compel a municipal corporation to take proper steps to raise means wherewith to pay judgments against it, is not affected by a statute limiting the lien of judgments on real estate to seven years. *United States ex rel. vs. Galena*, 268.
2. MUNICIPAL INDEBTEDNESS—REPEAL OF STATUTE.—A municipal corporation cannot plead the repeal of a law providing for the payment of its indebtedness, which was in force at the time the indebtedness was incurred. *Id.*
3. COUNTY COLLECTORS—CITY TAXES.—Town and county collectors so far as they are charged with the duty of collecting city taxes, will be deemed *pro tanto* city officers. *Id.*
4. MANDAMUS—COLLECTION OF JUDGMENTS—ANNUAL TAX—WAIVER.—Relator recovered judgments against the city of Galena for $25,000. At the time the judgments were rendered the law gave him the right to insist upon the annual levy of a tax of one per cent to apply upon the principal and the same per cent. to apply upon the interest of his judgments. Upon petition for a *mandamus* fifteen years after the date of the judgments: *Held*, that the court would not compel the levy and collection of sufficient taxes in one year to extinguish the whole indebtedness, and that by not enforcing his right to the annual tax, the relator waived it as to years past, and could now only require the levy of a one per cent. annual tax to apply on the principal and a one per cent. annual tax to apply on the interest, until the whole indebtedness was paid. *Id.*
5. CREDITOR'S BILL.—A creditor's bill can be maintained against a municipal corporation as a party defendant. *Granite Co. vs. Tilley*, 572.
MUNICIPAL INDEBTEDNESS.—*See* MUNICIPAL CORPORATIONS.
NATIONAL BANKS—*See* TAXATION OF NATIONAL BANK SHARES.
1. FALSE ENTRIES.—The word "false," as used in Section 5209, United States Revised Statutes, which provides that any officer of a National Bank making a false entry in any report, etc., means wilfully and intentionally false, and with intent to deceive,—a mistake in the amount of an item, would not make a man guilty under the law. *U. S. vs. Allen*, 90.
2. REPORTS—RESPONSIBILITY OF OFFICER MAKING.—Officers of National Banks who assume to make reports called for under the law must be held responsible civilly and criminally for the statements made in these reports. The officer cannot be heard to say that he did not know what was in the reports made and sworn to by him in the exercise of his duty under the law. *Id.*

NEGLIGENCE—*See* ADMIRALTY, 16.

EMPLOYER AND EMPLOYE—CONTRACTS AGAINST LIABILITY FOR NEGLIGENCE ARE VOID.—A contract between an employer and employé, by which the employé, in consideration of his employment, releases and discharges his employer from all liability for damages for injury or death of the employé, resulting from the negligence of his employer, is void as against public policy. *Roesner vs. Hermann*, 486.

NOTARY PUBLIC.

1. ELIGIBILITY OF MINORS—INDIANA STATUTES.—There is nothing in the Constitution or Statutes of Indiana making minors ineligible to the office of notary public; such office is not a county office within the meaning of the Constitution wherein it provides that none but electors shall hold county offices. *United States vs. Bixby*, 520.

2. SAME—COMMON LAW.—At common law a minor is eligible to the office of notary public.

NOTES, BILLS AND CHECKS.

PROMISSORY NOTES—INDORSMENT—CONSIDERATION—EVIDENCE.—An indorser of a promissory note, indorsed in order to perfect an agreement between the maker and the indorsee, may show by parol evidence, as against his indorsee, that he indorsed the note without consideration, and that he was not an accommodation indorser. *National Bank vs. Brush*, 188.

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PARTIES TO SUIT—*See* MORTGAGES, 4-6—EQUITY PLEADING—INSURANCE LAW, 4-6.

REAL PARTY IN INTEREST.—Extrinsic evidence is admissable to show who is the real party in a suit prosecuted or defended in the name of a nominal party, and the real party in interest is bound by the judgment equally as though he was a party of record. *Claflin vs. Fletcher*, 281.

PAROL EVIDENCE—*See* EVIDENCE.

PATENT LAW.

1. ASSIGNMENT—AMBIGUITY.—An assignment of all right, title and interest in letters patent "excepting thirty-two or thiry-three counties heretofore sold and assigned" is not necessarily void for ambiguity. *Washburn & Moen Man'f'g Co. vs. Haish*, 65.

2. CLAIM VOID FOR UNCERTAINTY.—The fourth claim in a re-issued patent was for "The arrangement of the rake-head E, and foot treadles H J and G K, or either, in relation to each other and the axle B, substantially as, and for the purposes, set forth:" *Held*, that as a combination of parts, this claim was void for uncertainty. *Edgarton vs. Furst & Bradley M'f'g Co.*, 402.

3. LANGUAGE OF CLAIMS—HOW CONSTRUED.—The language used in a patentee's claim is to be construed in the light of his specifications and the obvious design of the patent. *Robinson vs. Sutter*, 100.

4. CONSTRUCTION—STATE OF ART—OBJECT OF INVENTOR.—In order to give a proper construction to a patent and its re-issue, the state of the art and the object which the inventor proposed to accomplish must be considered. *Washburn & Moen Man'f'g Co., vs. Haish*, 65.

5. COMBINATION.—The fact that complainants had a patent for a certain combination of old parts of a machine, did not impair the right of defendants to combine the same parts, so long as they did not use the same combination shown in complainants' patent. *Puttee vs. Moline Plow Co.*, 377.

6. COMITY BETWEEN COURTS.—Where the testimony in a case involving the validity of a patent, is the same as that in a case previously decided in another district, the same construction will be given to the patent; but if a different combination of facts is presented, the case will be decided on its own merits. *Edgarton vs. Furst & Bradley M'f'g Co.*, 402.

DISCLAIMER—*See*, 29.

INFRINGEMENT—*See* MEASURE OF DAMAGES—PARTICULAR PATENTS.

7. COMBINATION.—A patent for a combination of known parts is not infringed by the use of any number of the parts less than the whole; but, if there are new parts to the combination, which are

PATENT LAW—*Continued.*

claimed as inventions, the use of these new parts is an infringement. *Rowell vs. Lindsay*, 217.

8. EXTENT OF CLAIM.—Where the patentee in his claim states only the combination as his invention, it will be conclusively presumed that the separate parts are old and in common use. *Id.*

9. SUIT FOR INFRINGEMENT—ABANDONMENT OF CLAIM.—If a patentee, suing for infringement, declares upon a combination of elements as constituting the novelty of his invention, he cannot abandon a part of such combination and maintain his claims to the rest, and much less can he prove part of his combination immaterial or useless. *Id.*

10. SUBSTITUTION OF PARTS—NEW ELEMENTS—NEW COMBINATION.—A patented combination is not infringed by the substitution for one of the parts, of an element which is new or which performs a substantially different function, or of one which was old, but at the date of the patent not known as a substitute for the omitted part; or by a new combination of the elements of the patent. *Id.*

11 CULTIVATOR.—A patent for an improvement in cultivators claimed the combination of a slotted beam, shank, brace-bar and bolt, constructed and arranged to operate as and for the purposes specified: *Held*, that such combination was not infringed by a machine which omitted the brace-bar, and did not substitute any equivalent element which wholly performed the same functions. *Id.*

12. LICENSE—ESTOPPEL.—The fact that the defendants at one time held a license from the complainant will not afterwards estop them from denying infringement although manufacturing the same article as before. *Blatherwick vs. Carey*, 494.

INVENTION.

13. DEGREE OF, REQUIRED.—Though a device, in order to be patentable, must be the result of inventive genius, yet if invention is required at all, in the production of the device, the law will not attempt to measure its extent or degree. *Washburn & Moen Man'f'g Co. vs. Haish*, 65.

14. UTILITY, EVIDENCE OF INVENTION.—The acceptance of a new device or combination by the public and putting it into extensive use is evidence that it was the product of invention. *Id.*

15. BARBED WIRE FENCE.—It required invention to devise and produce a barbed wire which could be practically used for fencing purposes. *Id.*

16. SAME—LIMITATION OF PATENTS.—But in view of the state of the art, it was not competent for any inventor to claim more than his own special method of forming and affixing the barb he had devised. *Id.*

17. EXTENSIVE USE NOT PROOF OF VALIDITY OF PATENT.—Courts will

PATENT LAW—*Continued.*

not sustain a patent because of the mere fact that the mode described in the patent has gone into extensive use. *Wilson Packing Co. vs. Chicago Packing and Provision Co.*, 559.

18. TOBACCO RE-SWEATING APPARATUS—INFRINGEMENT.—A patented apparatus for re-sweating tobacco, consisted of three parts, one of which was a wooden tobacco holder—described as a tight vessel—in which the tobacco was placed and suspended in steam for the purpose of being heated, and moistened by percolation through the wooden vessel: *Held*, to be infringed by a device operating upon the same principle, but the tobacco holder of which was not a "tight" vessel. *Robinson vs. Sutter*, 100.

19. NOVELTY OF DEVICE.—The wooden tobacco holder, the tobacco in which is moistened by percolation: *Held*, not to be anticipated by a metal holder into which the stream is directly admitted. *Id.*

MEASURE OF DAMAGES FOR INFRINGEMENT.

20. When a complainant's patent covers but one of many features of the machine manufactured by defendants, the profits on the entire machine cannot be reckoned as damages, but only the gains arising from the use of the special device or element covered by the complainant's patent. *Calkins vs. Bertrand*, 445.

21. BURDEN OF PROOF.—And in such case, the burden of proof is on the complainant to show how much of the profits made by defendants upon the whole machine, is due to the use of complainant's patented device. *Id.*

22. NOMINAL DAMAGES.—Where the complainant's testimony only tended to show the profits made by defendant on the entire machine; and defendant furnished affirmative evidence, showing that he made no extra profit from the use of complainant's device: *Held*, that a "division of profits" made by the master must be set aside, and complainant be awarded only nominal damages. *Id.*

23. COSTS.—In such case where the defendant has persistently fought the validity of complainant's patent and the question of infringement as well as the amount of damages, the court will award all the costs against the defendant. *Id.*

24. PROFITS—BURDEN OF PROOF.—In a suit to recover the profits made by an infringement of a patent for an improvement in machines, the burden is on the complainant to separate profits due to the improvement from the general profits of the business; and if he fails to show what proportion, if any, of the whole profits was produced by his improvement, he can only recover a nominal amount. *Kirby vs. Armstrong*, 135.

25. In a claim for damages for infringement of a patent, the profits of which the patentee is deprived, on account of the manufacture of the article by the defendant, constitute the measure of damages; and the fact that every operative part of the article was not

PATENT LAW—*Continued.*

covered by the patent, does not alter the rule. *Putnam vs. Lomax*, 546.

PRIOR USER.

26. DEFEAT OF PATENT FOR—BURDEN OF PROOF.—In order to defeat a patent on the ground of user of the patented article prior to the issuance of the patent, it must be shown that the article so relied upon as a defense, was complete and capable of producing the result attained by the patented article, and the burden of proof rests upon the one seeking to overthrow the patent. Every reasonable doubt should be resolved in favor of the patentee. *Washburn & Moen Manufacturing Co. vs. Haish*, 65.

27. APPLICATIONS — REJECTED CLAIMS — CONTINUITY OF PROCEEDINGS—TWO YEARS' LIMITATION OF PUBLIC USER.—Where an application for a patent was filed, covering several claims, some of which were rejected, and sul sequently, but before any patent was issued on such application, a second application was filed, embracing the subject-matter of the rejected claims of the first application, the invention in the second application being described in the specifications and drawings of the first, and the said rejected claims being afterwards withdrawn from the first application, and a patent thereupon issuing upon the good claims of such application, and a patent subsequently issuing upon the second application: *Held*, that for the purpose of fixing the time when the two years began to run within which the invention could be sold and publicly used without invalidating the patent, the continuity of the proceedings which originated in the first application was not broken up to the time of the issuing of the latter patent, and the two years dated back from the time of filing the first application. *Graham vs. McCormick*, 39.

28. PUBLIC USE FOR TWO YEARS—EVIDENCE.—When the infringer of a patent sets up in defense that the patent was void by reason of public use for two years prior to the filing of the application therefor, the proof should be clear and satisfactory, in order to justify the court in sustaining that defense. *Id.*

RE-ISSUE—*See* PARTICULAR PATENTS.

29. EFFECT OF DISCLAIMER ON CLAIM IN SUBSEQUENT RE-ISSUE.—In the original Whitcomb patent for improvement in horse hay-rakes, the patentee inserted the following disclaimer in his specifications: "I do not claim the wire teeth F, attached to the head E, as shown, for such device mounted on wheels is in quite common use." In the patent as re-issued, the disclaimer was omitted, and the following claim inserted: "2nd. The combination and relative arrangement of the hinged rake-head, with the supporting axle and carrying wheels * * * whereby the head is supported above the rear upper edge of the axle, as shown, and the lower ends of the teeth, when

PATENT LAW—*Continued.*

gathering the hay, occupy positions in rear of the tread of the wheels, and forward of a vertical plane on a line with the rear edge of the wheels." *Held*, that this claim in the re-issue was covered by the disclaimer in the original patent, and was therefore void. *Edgarton vs. Furst & Bradley Manufacturing Co.*, 402.

80. PRESUMPTION OF TITLE.—The re-issue of a patent to the assignee of the patentee, raises a presumption of title in such assignee. *Washburn & Moen Manufacturing Co. vs. Haish*, 65.

81. SPECIFICATIONS.—An inventor may in his specifications on the re-issue of his patent, make the description more full and accurate, but he must not substantially change it so as to describe another device, or cover anything not in the original. *Id.*

82. Where there was a claim for a device in the re-issue of a patent, which was not made in the original, but the device was clearly shown in the drawings accompanying the original: *Held*, that the re-issue was valid. *Id.*

83. CONSTRUCTION—STATE OF ART—OBJECT OF INVENTOR.—In order to give a proper construction to a patent and its re-issue, the state of the art and the object which the inventor proposed to accomplish must be considered. *Id.*

84. SPECIFICATIONS—APPLICATION—ESTOPPEL.—Where in the specifications accompanying a patent, a certain invention is described for which no claim is made and which is not covered by the patent issuing, this does not estop the inventor from afterwards applying for and obtaining a patent for such invention. *Graham vs. McCormick*, 39.

85. RIGHT TO REPLACE WORN PARTS OF MACHINE.—Where some of the parts of a patented machine wear out faster than others, the purchaser of such machine has the right to replace those parts as often as necessary, so long as the identity of the machine is retained. *Gottfried vs. Seipp Brewing Co.*, 868.

PARTICULAR PATENTS.

86. BARBED WIRE FENCE.—It required invention to devise and produce a barbed wire which could be practically used for fencing purposes. *Washburn & Moen Manufacturing Co. vs. Haish*, 65.

87. SAME—LIMITATION OF PATENTS.—But in view of the state of the art, it was not competent for any inventor to claim more than his own special method of forming and affixing the barb he had devised. *Id.*

88. HUNT PATENT—LIMITATION OF RE-ISSUE—SPUR WHEEL BARBS.—The original Hunt patent, of July 23, 1867, was for a method of "providing the wires of a wire fence with a series of spur-wheels." The re-issued patent, No. 6,976, dated March 7, 1876, was for a "wire fence provided with spurs." *Held*, that the re-issued patent is valid, but cannot be enlarged to include every kind of barb which

PATENT LAW—*Continued.*

may be attached to fence wire, and must be limited to the fence wire and spurs described in the original patent. *Id.*

39. KELLY PATENT, No. 74,369.—The Kelly patent, issued February 11, 1868, was for thorns or barbs fixed rigidly to the wires, so that they could neither slide lengthwise nor revolve upon the wires. The mode of accomplishing this was described to be by stringing them upon the wires by holes through the center, and then compressing them upon the wire by blows or pressure. In the re-issue of February 9, 1876, the same result was described as accomplished by "laying another wire of the same or different size alongside the thorn wire and twisting the two together;" *Held*, that the re-issue was valid. *Id.*

40. GLIDDEN PATENT, No. 150,683.—The Glidden patent was issued May 12, 1874, and re-issued February 8, 1876. In the re-issue was a claim for a barb made by coiling a short piece of wire between its ends around the fence wire: *Held*, that though this feature was not claimed in the original patent, yet as it was shown in the original specifications and drawings, the patent was properly re-issued to cover this device. *Id.*

41. GLIDDEN PATENT, No. 157,124.—The Glidden patent, issued November 24, 1874, was for a "twisted fence wire, having the transverse spur wire, D, bent at its middle portion about one of the wire strands of said fence wire, and clamped in its position and place by the other wire strand twisted upon its fellow, substantially as specified." *Held*, that at that time there was nothing left in the line of invention to justify the issue of this patent, and that it was void. *Id.*

42. INFRINGEMENT.—The defendant manufactured a twisted fence wire armed with a wire barb, cut diagonally so as to leave the points sharp, and bent in the form of a letter "S," so as to clasp both wires, and extend the sharp points in opposite directions from the wire: *Held*, that this was an infringement upon the Hurst and Glidden patents. *Id.*

43. BEDSTEAD FRAMES—CONSTRUCTION OF RE-ISSUED PATENT No. 7,704.—In re-issued letters patent No. 7,704, granted to the complainant for an improvement in bedstead frames, the *first* claim must be construed to mean a combination of side bars, inclined double end bars, and elastic coiled-wire fabric attached only to the end bars, with the end bars of the frame elevated above the side bars, so that the fabric is suspended above the side bars from end to end of the frame, and the second claim must be held to mean the combination of the side bars, standards, inclined double end bars, and elastic fabric, arranged as and for the purposes specified. *Woven Wire Mattress Co. vs. Simmons*, 394.

PATENT LAW—*Continued.*

44. INFRINGEMENT.—In defendants' bed bottom, the end bars are not inclined, and are not elevated above the side bars, but rest directly upon them. *Held*, in view of the state of the art at the time of the first patent, that the absence of inclined end bars in defendants' frame in connection with other differences, relieves the defendants from infringement. *Id.*

45. CANNED MEATS—RE-ISSUED WILSON PATENT, NO. 6,370, VOID FOR WANT OF NOVELTY.—The William J. Wilson re-issued patent, No. 6,370, for a new and useful improvement in the process for preserving and packing cooked meats for transportation,—consisting in thoroughly cooking the meat by boiling it in water, removing the bone and gristle without disturbing the natural grain of the meat, then placing it, while yet warm with cooking, into a box or case, and pressing it by some suitable apparatus with sufficient force to remove the air and all superfluous moisture, and thus make the meat form a solid cake, and then closing the box or case air-tight upon the meat,—is void for want of novelty. *Wilson Packing Co. vs. Chicago Packing & Provision Co.*, 559.

46. SAME.—There is nothing new in this mode of preserving meat, unless it is in putting the meat into the cans while yet "warm with cooking," and that does not render the process patentable. *Id.*

47. RE-ISSUED PATENT, NO. 7,923, FOR METALLIC CANS FOR COOKED MEATS, VOID.—The John A. Wilson re-issued patent, No. 7,923, for a useful improvement in metallic cans for containing cooked meat, —consisting in a pyramidal-shaped can, having rounded corners and both ends slightly flaring, so as to form shoulders or offsets, against which the head or end pieces rest,—is void for want of novelty. *Id.*

48. CANNED MEAT AS A NEW ARTICLE OF MANUFACTURE—PATENT FOR, VOID.—Claim 3 of the same patent, which is a claim, as an improved article of manufacture, of solid meat compressed and secured within a pyramidal case or can, so that said can forms a mould for the meat, and permits its discharge in a solid cake, is also void. *Id.*

49. CULTIVATORS.—A patent for an improvement in cultivators claimed the combination of a slotted beam, shank, brace-bar and bolt, constructed and arranged to operate as and for the purposes specified: *Held*, that such combination was not infringed by a machine which omitted the brace-bar and did not substitute any equivalent element which wholly performed the same functions. *Rowell vs. Lindsay*, 217.

50. NOVELTY.—The patents of complainants and of the patentees under whom they hold for improvements in cultivators, so far as they claim an exclusive right to the use of an arched axle, with a two-way joint or hinge in the middle, by which lateral and vertical

PATENT LAW—*Continued.*

motion of the plow beam is secured, and the plow held in an upright position, were anticipated by prior patents, and cannot be sustained for want of novelty. *Pattee vs. Moline Plow Co.*, 377.

51. COMBINATION.—The fact that the complainants had a patent for a certain combination of old parts of a machine, did not impair the right of defendants to combine the same parts, so long as they did not use the same combination shown in complainants' patent. *Id.*

52. The court finds that Pattee, the complainant, was not the first to conceive and embody in working form, the idea of a tongueless straddle-row cultivator. *Id.*

53. Discussion of various patents for improvements in cultivators. *Id.*

54. HARVESTERS—GRAHAM PATENT issued February 11, 1868, for an improvement in harvesters, sustained. *Graham vs. McCormick*, 39.

55. HAY-RAKES—WHITCOMB PATENT FOR—EFFECT OF DISCLAIMER ON CLAIM IN SUBSEQUENT RE-ISSUE.—In the original Whitcomb patent for improvement in horse hay-rakes, the patentee inserted the following disclaimer in his specifications:

"I do not claim the wire teeth F attached to the head E, as shown, for such device mounted on wheels is in quite common use." In the patent as re-issued, the disclaimer was omitted, and the following claim inserted: "2nd. The combination and relative arrangement of the hinged rake-head, with the supporting axle and carrying wheels * * * whereby the head is supported above the rear upper edge of the axle, as shown, and the lower ends of the teeth, when gathering the hay, occupy positions in rear of the tread of the wheels, and forward of a vertical plane on a line with the rear edge of the wheels." *Held*, that this claim in the re-issue was covered by the disclaimer in the original patent, and was therefore void. *Edgarton vs. Furst & Bradley Mfg. Co.*, 402.

56. INFRINGEMENT.—*Held, further*, that such claim was not infringed by a rake-head, suspended behind or in the rear of the axle by brackets, hung, so to speak, behind the axle, instead of being supported above it. *Id.*

57. CLAIM VOID FOR UNCERTAINTY.—The fourth claim in the re-issued patent was for "The arrangement of the rake-head E, and foot-treadles H J and G K, or either, in relation to each other and the axle B, substantially as, and for the purposes, set forth:" *Held*, that as a combination of parts, this claim was void for uncertainty. *Id.*

58. CLAIM FOR TREADLES—PRIOR USE—VOID PATENT.—The court finds from the evidence that these treadles were used and sold with Whitcomb's consent, more than two years before the patent was applied for, and hence the patent as to them is void. *Id.*

59. *Brown vs. Whittemore*, and *Edgarton vs. Beck*, commented upon. *Id.*

PATENT LAW—*Continued.*
HORSE HAY-RAKES—*See* 55-59.
60. HORSE-SHOES.—The Blatherwick patent, No. 170,809, for an improvement in horse-shoes, for the purpose of preventing interfering, must be limited in its application to the particular kind of shoe described, and cannot be extended to include all shoes where the toe-calk or tumbling point is changed to a point inside the natural line when placed on the foot. *Blatherwick vs. Carey*, 494.
61. PAPER HOLDERS.—The Smith & Shannon patent for an improvement in paper holders, is valid. *Shannon vs. Jones Stationery Co.*, 498.
62. The device of defendant, *held*, to be an infringement. *Id.*
63. PITCHING BARRELS—INFRINGEMENT.—The Gottfried patent for heating barrels, for the purpose of pitching, by means of a blast of hot air, is not infringed by the use of a blast of superheated steam. *Gottfried vs. Seipp Brewing Co.*, 369.
PENSION LAW.
INDICTMENT—ILLEGAL FEES.—Section 5485, U. S. Revised Statutes, provides a penalty for any person receiving a greater compensation for obtaining a pension, "than is provided in the Title pertaining to pensions"; under that title (Sec. 4785) the Commissioner of Pensions was authorized to allow a fee of not exceeding $25, for prosecuting a claim. By act of June 20, 1878, section 4785 was repealed and the reception of a greater sum than $10, for procuring a pension made unlawful: *Held*, that the provisions of section 5485, relating to the offense of charging illegal fees, obtain and apply to violations of the act of June 20, 1878. *United States vs. Dowdell*, 483.
PLEADING—*See* EQUITY PLEADING—DEMURRER TO EVIDENCE.
MUNICIPAL BONDS—NECESSARY ALLEGATIONS IN COMPLAINT.—In an action on municipal bonds the plaintiff must show in his complaint, either that the bonds contain such recitals as would preclude the municipalty from impeaching their validity, or else that they were issued in substantial compliance with the law authorizing them, and for a proper purpose. *Hopper vs. Covington*, 488.
POWERS—*See* MORTGAGES, 4-9.
PRACTICE.
1. CONSOLIDATION OF SUITS—DISCONTINUANCE.—Where one party has commenced a number of separate suits against another founded upon independent causes of action of like nature, and such suits have all been consolidated by order of the court upon motion of the defendant, the plaintiff will be allowed to discontinue, without prejudice, as to any one or more of the original causes of action. *Young vs. Grand Trunk R'y*, 550.

PRACTICE—*Continued.*

2. DISMISSAL OF CAUSE—RIGHT OF APPEAL.—Where several suits between the same parties have been consolidated, the fact that the amount involved in the consolidated suit might allow the defendant the right of appeal, cannot prevent the plaintiff from discontinuing as to one or more of the original causes so as to bring the amount involved below that necessary to allow an appeal. *Id.*

3. DEMURRER TO EVIDENCE—WHEN ALLOWED.—The party upon whom rests the burden of proof in the trial of a fact before a jury, cannot demur to the evidence of the adverse party. *Pickel vs. Ingrigg*, 230.

4. FACTS ADMITTED BY DEMURRER—RECORD.—A demurrer to evidence must distinctly admit on the record every fact which there was any evidence tending to prove, so that the court will have nothing to do but to apply the law to the established facts. *Id.*

5. EQUITY PRACTICE.—Where a re-hearing has been granted and leave given to file an amended answer setting out newly-discovered matter, it is not necessary to obtain leave of the court to make a motion to strike such answer from the files for non-compliance with the order. *Allis vs. Stowell*, 57.

6. SALE EN MASSE, when the property lies in two separate tracts both of which have been subdivided into lots, is irregular. *Stinson vs. Pepper*, 107.

PREFERENCE—*See* BANKRUPTCY.

PRIORITY OF JURISDICTION—*See* SERVICE OF PROCESS, 1.

PRIOR USER—*See* PATENT LAW, *26 et seq.*

PROCESS—*See* SERVICE OF.

PROMISSORY NOTES—*See* NOTES, BILLS AND CHECKS.

PUBLIC POLICY—*See* CONTRACTS, 1.

1. CONTRACT TO EVADE PROCESS OF COURT IS VOID.—Defendants agreed with plaintiff to pay him a salary and his expenses while keeping himself without the jurisdiction of the court, in order to evade service of process: *Held*, that the agreement was void as against public policy and no recovery could be had thereon. *Bierbauer vs. Wirth*, 60.

2. MONEY EXPENDED AT REQUEST.—In such case the plaintiff could not recover his expenses as money expended at the request of the defendants. The law will go behind the request to unravel the transaction and discover its origin. *Id.*

RAILROADS—CONSOLIDATION OF—*See* CORPORATIONS.

1. PAYMENT OF RAILWAY INDEBTEDNESS—LIENS—ESTOPPEL.—In this case the petitioner paid an indebtedness of the railway company, incurred on account of construction: *Held*, that in order to give him a superior equity to the bondholders, it must be alleged and proved that he acted under such inducements from them and had such dealings with them in the transaction, as estop them from as-

RAILROADS—*Continued.*
serting their liens against his claim. It is not sufficient that the original indebtedness was incurred at the request of the bondholders. *Kelly vs. G. B. & M. R. R. Co.*, 151.

2. FORECLOSURE OF RAILROAD MORTGAGE—SALE—PAYMENT WITH BONDS—PROVISIONS IN MORTGAGE.—Provisions in a railroad mortgage, that in case the trustee should sell the mortgaged property upon default of payment, the mortgage bonds should be received at a rate to be fixed in a certain manner, as part of the purchase price, do not bind the court, if foreclosure proceedings are instituted and a sale is made under its direction. *Loan & Trust Co., vs. G. B. & M. R. R. Co.*, 203.

3. VALUE OF BONDS RECEIVED IN PAYMENT—WHEN FIXED.—Where in the foreclosure of a railroad mortgage the court decrees that at the sale the mortgage bonds may be received in part payment of the purchase price, it is not necessary nor customary to fix the value of such bonds, prior to the confirmation of the sale. *Id.*

4. CONTROVERSY AS TO TITLE—BILL OF REVIEW.—The fact that the receiver of the railroad has filed a bill to set aside certain deeds of lands which he claims belongs to the railroad, and about which there is a controversy, is no ground for allowing a bill of review, upon petition of one of the bondholders, for the purpose of setting aside the decree for the sale of the road. The title to such lands cannot be determined in the foreclosure proceedings. *Id.*

5. SERVICE OF PROCESS.—It cannot concern bondholders how service of process on a railroad company is obtained in a foreclosure suit, provided the court legitimately obtains jurisdiction of the parties and the indebtedness is not questioned. *Id.*

6. LACHES in filing petition for leave to file a bill of review, considered. *Id.*

REAL ESTATE—*See* TITLE, 4–6.

1. TITLE BY ADVERSE POSSESSION—TAX TITLE.—A party may gain title to premises by adverse possession by entering into possession under claim of title founded upon a tax deed, fair upon its face, even though it were illegally issued. *Cowley vs. Monson*, 182.

2. QUITCLAIM DEED—COLOR OF TITLE.—A quitclaim deed, if relied upon as conveying a good title, may constitute a good foundation for title by adverse possession. *Id.*

3. IN ORDER TO GAIN TITLE by adverse possession in Wisconsin, the party must have had possession under a claim of title, whether founded upon a written instrument or not, exclusive of any other right. *Heermans vs. Schmaltz*, 328.

4. PRESUMPTION.—Evidence of adverse possession is always to be construed strictly, and every presumption is to be made in favor of the true owner. *Id.*

5. SAME—ENTRY UNDER CONTRACT—ESTOPPEL.—A party who enters

REAL ESTATE—*Continued.*

into possession of lands under a contract to purchase, is estopped from asserting a paramount title by adverse possession, unless there has been express notice to the vendor of an intention to claim adversely, or a surrender of the possession flowing from the original entry, prior to the time of the adverse possession beginning to run. *Id.*

6. EVIDENCE—VERBAL ADMISSIONS—ADMISSIBILITY AFTER DEATH.—Verbal admissions by the adverse claimant that he entered into possession under a contract, and that he had never paid anything on the same, are not rendered inadmissible in evidence after his death, by sections 4069 and 4070, Revised Statutes of Wisconsin. *Id.*

REDEMPTION—*See* MORTGAGES, 4–10.

FROM SALE UNDER POWER IN TRUST DEED.—Under a clause in a trust deed, the entire debt was declared due, for non-payment of an installment of interest, and the property sold by the trustee, after publication notice, for less than one-third its value, and for a smaller amount than the mortgage debt, it being bid in by the holder of the note, who prior to the sale had given the mortgagor to understand that when sold the property would be held merely as a security for the balance of the debt, and that he would have the right to make disposition of the property, using the proceeds to satisfy the balance due. After the sale the holder refused to carry out this arrangement: *Held*, that the mortgagor was entitled to redeem, on paying the full amount of the indebtedness, interest and taxes. *Stinson vs. Pepper*, 107.

RE-ISSUE—*See* PATENT LAW, 29 *et seq.*

REMOVAL OF CAUSES.

1. CITIZENSHIP OF CONSOLIDATED CORPORATIONS.—When a corporation created by the laws of one state, becomes consolidated with corporations of other states, and changes its name, and is sued by the new name in a court of the state of its creation, by a corporation of the same state, another one of the consolidated corporations, created by another state, cannot go into the state court and have the cause removed to the Federal Court. *C. & W. I. R. R. Co. vs. L. S. & M. S. R'y Co.*, 122.

2. CONSOLIDATION OF CORPORATIONS.—The result of the consolidation of the various corporations is, that as to any one state, the corporation of that state is the sole representative of the other corporations. *Id.*

3. ATTACHMENT SUIT.—A party who has interpleaded under the statute of Illinois in an attachment suit, can, if he is a citizen of another state, have the cause removed to the Federal Court. *Gilman vs. Wheelock*, 430.

4. GARNISHEE PROCEEDINGS.—An issue between a plaintiff and a gar-

REMOVAL OF CAUSES—*Continued.*

nishee as to the liability or indebtedness of the latter to the defendant in the principal action, is not such a controversy as can be removed, separate and apart from the principal action, from the State to the Federal Court on the ground of citizenship. It is simply an auxiliary proceeding to be disposed of by the same court which has jurisdiction over the original suit. *Pratt vs. Albright*, 511.

5. SAME.—The fact that the garnishee proceeding was instituted under the state statute, concurrently with the suit against the principal defendant, and that the principal suit has been disposed of by judgment against such defendant, does not bring the garnishee suit within the contemplation of the Removal Act. *Id.*

6. SUIT FOR INSURANCE—CONTROVERSY.—Insured property was destroyed by a fire alleged to have been occasioned by the negligence of the defendant. The insurance covered only a part of the value of the property and was paid by the insurer to the owner. The owner, a citizen of Wisconsin, and the insurance company, a citizen of New York, joined in an action in the State Court, to recover the total loss. The defendant, a citizen of Wisconsin, attempted to remove the cause to the Federal Court: *Held*, that the case did not involve a controversy which was wholly between citizens of different states and which could be fully determined between them without the presence of the plaintiff who was a citizen of the same state with the defendant, within the meaning of the second clause of section two of the Removal Act, of 1875, and therefore was not removable under the act. *Presbyterian Society vs. Goodrich Trans. Co.*, 312.

7. The fact that there were issues between the Insurance Company and the defendant, touching the issuance of the policy of insurance, the amount of insurance, the payment thereof, and the assignment of the claim, did not make out a controversy which would render the cause removable. *Id.*

8. CONTROVERSY WITH RECEIVER APPOINTED BY STATE COURT.—Where the receiver of a construction company appointed by a State Court, has gone on, under the terms of the order of appointment with the work of construction, and has made contracts for that purpose, if a controversy arises between a contractor and the receiver, or between a contractor and other claimants of a common fund, the State Court under whose authority the contracts were entered into is the proper tribunal to decide the questions, and the contractor is not entitled to have the cause removed to the Federal Court on the ground of citizenship. *Buell vs. Construction Co.*, 555.

REPLEVIN—*See* FEDERAL JURISDICTION, 3—RES JUDICATA.

REPORTS—*See* COPYRIGHT.

REPUTATION—*See* EVIDENCE.

RES JUDICATA.

REPLEVIN.—Judgment in a replevin suit brought to obtain possession of goods, is conclusive as to the ownership in an action between the same parties, to recover the value of the goods. *Claflin vs. Fletcher*, 281.

RULE 66 IN EQUITY.

A suit will not be dismissed under the sixty-sixth rule in equity, for want of replication to an amended answer, where a motion is pending to strike such answer from the files for irregularity and insufficiency. *Allis vs. Stowell*, 57.

SAILING RULES—*See* ADMIRALTY, 14–15.

SALE EN MASSE—*See* SHERIFF'S SALE.

SEAMEN'S WAGES—*See* ADMIRALTY, 11–13.

SERVICE OF PROCESS.

1. PRIORITY OF JURISDICTION—FORECLOSURE OF MORTGAGE.—A bill was filed in the State Court to enjoin the foreclosure of a mortgage, and to have it set aside and declared void. Later, but on the same day, a bill was filed in the United States Circuit Court to foreclose the mortgage. The process from the United States Court was first served: *Held*, that the fact that the process of the United States Court was first served, gave that court jurisdiction to go on with the foreclosure suit and determine all questions as to the validity of the mortgage. *U. M. L. Ins. Co. vs. Chicago University*, 191.

2. It cannot concern bondholders how service of process on a railroad company is obtained in a foreclosure suit, provided the court legitimately obtains jurisdiction of the parties, and the indebtedness is not questioned. *Loan & Trust Co. vs. G. B. & M. R. R. Co.*, 208.

SHERIFF'S SALE.

A SALE EN MASSE, when the property lies in two separate tracts, both of which have been subdivided into lots, is irregular. *Stinson vs. Pepper*, 107.

STATE ELECTIONS, RIGHT OF CONGRESS TO LEGISLATE AS TO—*See* CONSTITUTIONAL LAW, 1–3.

STATES, BOUNDARIES OF—*See* ADMIRALTY, 9–10.

STATUTE OF LIMITATIONS—*See* TITLE.

1. MUNICIPAL CORPORATIONS—JUDGMENTS—LIMITATION OF LIENS.—The power of the court to compel a municipal corporation to take proper steps to raise means wherewith to pay judgments against it, is not affected by a statute limiting the lien of judgments on real estate to seven years. *United States ex rel. vs. Galena*, 263.

2. DOWER—INDIAN TITLE.—The defendants had been in possession of the land in controversy for more than seven years prior to the commencement of proceedings against them, and had paid the taxes during that time. Their possession was under a claim of

STATUTE OF LIMITATINS—*Continued.*

title from the husband of the complainant. *Held*, that the fact that complainant was an Indian woman and a member of an Indian tribe, did not prevent the Illinois statute, relative to seven years' possession under claim of title, from operating against her and barring her right of dower. *Ash-Kum vs. Sorin*, 293.

3. LACHES—DEMURRER.—If the doctrine of *laches* can ever be applied in a suit in equity, as to the bringing of which there is a statute of limitations, a demurrer insisting upon a lapse of time short of the statutory period will not be sustained unless the bill upon its face, without resorting to inferences, makes a clear case of unreasonable delay. *Sheldon vs. Keokuk N. L. Packet Co.*, 470.

4. The defense of the statute of limitations may be taken advantage of on demurrer to a bill in equity. *Id.*

5. FRAUD.—It will not be inferred, in support of a demurrer setting up the statute of limitations, from the fact that the alleged fraud occurred more than six years prior to the commencement of the suit, that the complainants discovered the fraud six years prior. *Id.*

SUBSCRIPTIONS BY RESPONSIBLE CITIZENS—*See* WILLS.

SUBROGATION—*See* INSURANCE LAW, 9.

SUPERSEDEAS BOND.

PERFORMANCE OF CONDITION—REMITTITUR—CHANGING JUDGMENT—RELEASE OF SURETIES.—The condition of a *supersedeas* bond was that the defendant (plaintiff in error) should prosecute its writ of error to effect, and answer all damages and costs if it failed to make good its plea. The judgment in the court below was for $119,061.46—$107,353.44 being on a general verdict of the jury, and $11,708 being on a special verdict. The Supreme Court reversed the judgment and remanded the cause, ordering the special verdict to be set aside. The Supreme Court also ordered that if the plaintiffs would file a *remittitur* of the amount of the special verdict, in the Circuit Court, and a certified copy thereof in the Supreme Court, the judgment of reversal would be set aside, and a judgment of affirmance entered in its stead. This was accordingly done. In a suit against the sureties on the *supersedeas* bond: *Held*, that the condition of the bond had been complied with, and that the sureties were released from all liability. *Seymour vs. Gregory*, 13.

SURETIES—*See* SUPERSEDEAS BOND.

TAXATION OF NATIONAL BANK SHARES.

1. In the assessment for taxation of shares of a national bank, the shareholders are not entitled to any allowance for such of the capital and surplus of the bank as is invested in Government bonds. *First National Bank vs. Farwell*, 270.

2. DISCRIMINATION IN ASSESSMENT—INJUNCTIONS.—In order to sustain

TAXATION OF NATIONAL BANK SHARES—*Continued.*
a bill to restrain the collection of taxes upon national bank shares, upon the ground of discrimination, it must be distinctly alleged that the shares are valued higher than other moneyed capital generally, and it is not sufficient to allege that such is the fact in particular instances. *Id.*

3. VALUATION.—Section 5219 of the Revised Statutes of the United States, which provides that national bank stock may be taxed by a state, but not "at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state," has reference to the entire process of assessment, and prevents as well an unequal valuation of such shares, as an unequal rate of of percentage thereon. *Evansville National Bank vs. Britton*, 508.

4. INDIANA REVENUE LAW—DISCRIMINATION AGAINST BANK SHARES—ILLEGAL ASSESSMENT—INJUNCTIONS.—The Indiana Revenue Law provides that the tax upon "credits" shall be only for the balance which may remain after deducting the amount of the taxpayer's *bona fide* indebtedness, but requires that national bank stock shall be taxed according to its fair value without reference to the indebtedness of its owner. *Held*, that this was contrary to the Act of Congress, and that any holder of shares in the complainant bank, who, at the time an assessment was made, had debts which were not deducted from his other credits, nor from the valuation of his bank stock, was entitled to an injunction against the collection of the taxes upon his shares of such stock. *Id.*

5. In such case those shareholders who had no debts to be deducted, would not be entitled to such injunction. *Id.*

6. RIGHT OF NATIONAL BANK TO ENJOIN THE COLLECTION OF TAX UPON ITS SHARES.—The state law having imposed upon the bank officers the duty of retaining out of dividends belonging to the respective shareholders, a sum sufficient to meet the taxes assessed upon their shares, and subjected the officer who should pay dividends to a stockholder, before the taxes upon his shares were satisfied, to a personal liability for such taxes, the bank can maintain a suit to enjoin the collection of taxes illegally assessed against the shareholders, in order to protect its officers and prevent a multiplicity of suits. *Id.*

TAX TITLE—*See* TITLE, 2.

TITLE.

1. RE-ISSUE OF PATENT—PRESUMPTION OF TITLE.—The re-issue of a patent to the assignee of the patentee, raises a presumption of title in such assignee. *Washburn & Moen Manfg. Co. vs. Haish*, 65.

2. REAL ESTATE—TITLE BY ADVERSE POSSESSION—TAX TITLE.—A party may gain title to premises by adverse possession by entering

TITLE—*Continued.*

into possession under claim of title founded upon a tax deed, fair upon its face, even though it were illegally issued. *Cowley vs. Monson*, 182.

3. QUIT-CLAIM DEED—COLOR OF TITLE.—A quit-claim deed, if relied upon as conveying a good title, may constitute a good foundation for title by adverse possession. *Id.*

4. GOVERNMENT GRANT—TITLE TO LAND BEFORE PATENT ISSUES—RIGHT OF DOWER.—Where the Government agrees to grant certain land, and the land is located and surveyed and the boundaries established before the issuing of a patent, the wife of the grantee is thereby clothed with an inchoate right of dower, which becomes consummate on his death, although the patent is not issued till subsequently. *Ash-kum vs. Sorin*, 293.

5. TITLE TO LAND IN INDIAN.—An Indian who gains a perfect title to land within a state, is not exempt, nor is the land exempt, from any of the ordinary burdens and incidents which the law of the state imposes upon the owners of lands, or upon the lands themselves. *Id.*

6. DOWER—STATUTE OF LIMITATIONS—INDIAN TITLE.—The defendants had been in possession of the land in controversy for more than seven years, prior to the commencement of proceedings against them, and had paid the taxes during that time. Their possession was under a claim of title from the husband of the complainant. *Held*, that the fact that complainant was an Indian woman, and a member of an Indian tribe, did not prevent the Illinois statute, relative to seven years' possession under claim of title, from operating against her and barring her right of dower. *Id.*

7. TITLE BY ADVERSE POSSESSION.—In order to gain title by adverse possession in Wisconsin, the party must have had possession under a claim of title, whether founded upon a written instrument or not, exclusive of any other right. *Heermans vs. Schmaltz*, 323.

8. SAME—ENTRY UNDER CONTRACT—ESTOPPEL.—A party who enters into possession of lands under a contract to purchase, is estopped from asserting a paramount title by adverse possession, unless there has been express notice to the vendor of an intention to claim adversely, or a surrender of the possession flowing from the original entry, prior to the time of the adverse possession beginning to run. *Id.*

TRUSTS.

1. CREATION OF EXPRESS TRUSTS—WISCONSIN STATUTES.—A conveyance of lands in trust to rent and sell the same and pay the proceeds to the grantor during his life, and after his death, to certain other persons named in a supplementary writing, will create a lawful trust, under the fifth subdivision of section 2081, Revised Statutes of Wisconsin. *Heermans vs. Schmaltz*, 323.

TRUSTS—*Continued.*

2. CONSTRUCTION OF SUPPLEMENTARY INSTRUMENT.—The original conveyance and supplementary writing will be construed together as one instrument. *Id.*

3. DEFINITENESS OF TRUST—DESIGNATION OF CLASS.—The fact that part of the beneficiaries are designated as a class, instead of naming them individually, will not render the trust void, on the ground that the trust is not fully expressed and clearly defined. *Id.*

4. Distinction between Wisconsin and New York statutes concerning trusts considered. *Id.*

UNLOADING VESSELS—*See* ADMIRALTY, 6.

VERBAL ADMISSIONS—*See* EVIDENCE, 13.

VESTED INTEREST—*See* INSURANCE LAW, 10—MORTGAGES, 5.

VOTING AT STATE ELECTIONS, RIGHT OF CONGRESS TO LEGISLATE AS TO—*See* CONSTITUTIONAL LAW, 1-3.

WAGES—*See* ADMIRALTY, 11-13.

WARRANTY OF GOODS.

1. CONTRACTS—CONSTRUCTION OF.—A. contracted to deliver B. "75 boxes Kingan's Cumberland Cut Bacon," and the goods were warranted "to be of the choicest quality of grade and brand." Kingan & Co. put up two brands of bacon, marked respectively, "Kingan's Packing Co. Cumberland Cut Bacon," and "Taylor's Cumberland Cut Bacon," both of equal quality; but at the place where the goods were delivered the former was considered as more choice. *Held* that the contract called for the former brand. *Walker vs. Gooch*, 159.

2. KNOWLEDGE OF PARTIES.—The fact that the former brand was forwarded exclusively to an agent, and that the latter brand was in the general market, makes no difference unless both parties had knowledge of such fact. *Id.*

3. SALE BY CONSIGNEE.—The contract provided that if the goods were not of the brand and grade called for, the "sale to be voided, and goods sold for account" of the vendors. The vendee had notice by bills of lading and invoices, of the brands of goods forwarded him, and paid the drafts drawn on him, received the goods and sold them for account of vendors. The court having *held*, that the goods delivered were not the ones contracted for: *Held*, further, that it was not the duty of the consignee to refuse to receive the goods shipped, and that he was entitled to recover the difference between the proceeds of the goods and the price paid under the contract. *Id.*

WILLS—*See* MORTGAGES, 4.

1. BEQUEST UPON CONDITION.—A testator by codicil to his will devised to his executors the residue of his estate for the purpose of founding an agricultural school at Knoxville, upon condition,

WILLS—*Continued.*

"that before or within six months after my decease, responsible citizens of Knoxville and Knox county shall pledge at least forty thousand dollars to the same object and purpose." *Held*, that the testator by the last clause of the above condition did not contemplate the *payment* of the whole sum of $40,000 from the citizens of Knoxville, within six months after his decease, and a valid subscription for that amount payable at a future day by responsible citizens was a sufficient compliance with the condition of the bequest. *Yale College vs. Runkle*, 300.

2. VALID SUBSCRIPTIONS.—The fact that these subscriptions were not payable in full until four years from date, in view of the fact that a long time must necessarily elapse before the estate of the testator could be settled and the money to pay the bequest realized from the sale of his property, does not make the subscriptions inoperative, provided they were in other respects responsible pledges; nor are they affected by making them payable to the executors of the will. *Id.*

3. IRRESPONSIBLE SUBSCRIPTIONS.—The court is of opinion, from the character of the subscriptions made, they being in small amounts, by a large number of persons of limited means, and some of them conditional, that the subscription list in question was not a pledge of $40,000 by *responsible* citizens, as contemplated by the testator. *Id.*

4. CODICIL—REPEAL OF WILLS—PAYMENTS DURING LIFE.—The testator, by the original will and by a codicil, after making donations to certain institutions, declared that all sums paid by him in his lifetime to such institutions should be deducted from such bequests. By a second codicil other bequests were made to the same institutions, and it was declared that by such second codicil he repealed, annulled and declared void all clauses in his will and first codicil, inconsistent with the second codicil, otherwise they were to remain in force. *Held*, that taking into view the general scope and purpose of the original will as well as the codicils, it must be considered that the testator intended that all payments made during his lifetime should be deducted from the bequests made. *Id.*

WISCONSIN CODE—*See* ACTION.

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